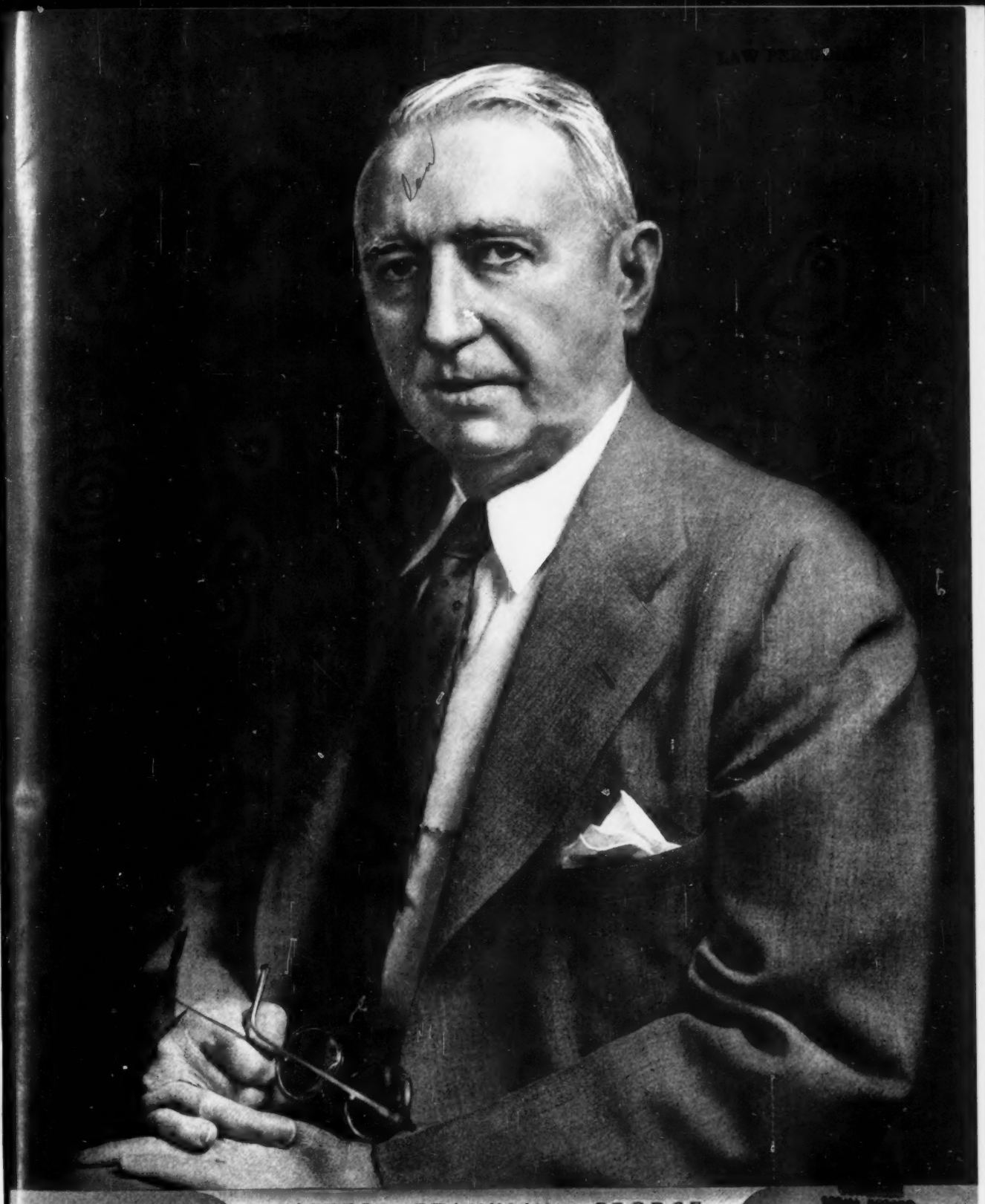

WALTER FRANKLIN GEORGE
Senator of the United States

AMERICAN BAR ASSOCIATION JOVRNAL

October 1946

What Makes an ALL-AMERICAN?

Football authorities generally agree that the All-American player of this or any season is the player who besides being endowed with natural ability must possess exceptional qualities of endurance, speed, strategy and drive. He must play according to the highest traditions of the game. Early in the season he is a marked man and in order to be included in that select group of football immortals he must produce outstanding results in every game in which he plays.

Behind the impressive performance of a great player lies the combined effort and teamwork of his fellow players. Without this vital assistance a player has little chance of becoming an All-American. In the crucial moments of important games complete coordination of every man on the team is needed.

A good insurance agent is much like an All-American. He produces outstanding results for himself and the company he represents. Yet never does he forget that the interests of his policyholders are paramount and to this his efforts are aimed.

With him at all times are the services and teamwork of a great company . . . a company experienced in every detail of the business . . . a company friendly and cooperative.

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HARTFORD, CONNECTICUT

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Speak Your Views at to Changes

Our leading editorial discusses changes in the Rules of Civil Procedure, recommended by the Supreme Court's Advisory Committee. That as to "discovery" access to adversary files is disturbing many lawyers. We give also the text of a sub-committee's draft of a condemnation rule. An "open forum" at Atlantic City will give lawyers a chance to make known their views as to these controversial changes.

Juries, Judges and Justice

The working Editor of a great newspaper gives vividly his impressions and his criticisms—as he gave them to judges. Lawyers who have something to tell and "sell" as to their profession or their work could gain much by studying his style and learning the secret of his "punch." "That's the way we have to tell a story—through people—if we wish our readers to understand it," says this man who knows. Every lawyer, judge and teacher of law should read and think about this article.

Natural Law, Totalitarianism and Mr. Justice Holmes

The great debate initiated by Ben W. Palmer's articles comes to a climax. Charles W. Briggs replies to Mr. Palmer's strictures as to "the Olympian" and challenges the fundamental philosophy of "natural law". Mr. Palmer makes a spirited reply. Our readers will find this provocative discussion a feature of absorbing interest.

Brandeis the Lawyer and Jurist

Walter P. Armstrong contributes a notable review-sketch, based principally on Professor Mason's outstanding biography. Further material from independent sources is also in the sketch.

"Limited World Government Now"?

The Atlantic City meeting will debate and decide whether the Association shall move beyond its staunch support for The United Nations and "organized cooperation of the Nations for peace and law" and give its support to "world government", limited or otherwise. Judge Frederic M. Miller and Frank E. Holman, both of the House of Delegates, give differing views preliminary to this important discussion and decision.

The Connally Amendment of the Morse Resolution

The reservation or condition as to matters within the domestic jurisdiction of the United States, reserving to this country a power of unilateral decision as to submission to the World Court, has raised serious questions which Professor Lawrence Preuss discusses in this issue.

Program for Annual and Section Meetings

A limited amount of space in this issue is devoted to programs. Members will receive detailed programs in the Advance Program pamphlet.

"Know-how" Under the Administrative Procedure Act

In our series of useful articles on practice under the new law, the first of the two articles on "'Informal' Dispositions under the Administrative Procedure Act", is contributed by Ashley Sellers, of the Texas and Georgia Bars, whose relationship to the careful draftsmanship was such as to make him an authority as to the legislative intent.

Notice of Amendments

Those who look after the sound business management of the Association have filed a further proposal to amend its By-Laws, to be voted on in Atlantic City. Notice of other amendments were in our September issue (page 588).

"Among Our Contributors"

Believing that our readers would like to know something of the personalities, careers, experience, backgrounds, etc., of those who contribute articles to the JOURNAL, we institute this month a new department, to give significant information of that kind.

"Know Your Sections in the Association"

The JOURNAL seeks to acquaint its readers, particularly the newer members, with the structure and personnel of their Association. Last month's article was "Know Your House of Delegates," with the full roster of the present membership. This month the Sections are described, with the names of their officers and Council members. Association members can join the Sections which will help them in their daily work.

Ross Essay Prize

The announcement as to the winner of the $3,000 prize for 1946 will be of interest to our readers, as he is the 34-year-old author of "Going It Alone". (32 A.B.A.J. 397).

"Books for Lawyers"

Parallels between an independent, fearless newspaper and an independent, outspoken Bar Association, and the qualities which they need to have in common for the effective performance of their public functions, are suggested in the leading review. Reginald Heber Smith writes a characteristic "review" of a magazine article.

Legal Work

IS THE SUBJECT OF NEIGHBORHOOD GOSSIP

Recently a Western lawyer found in the files of an estate a letter describing how the writer had secured a homestead exemption. The following extract is a gem:

"He read a whole set of lawbooks on this thing, so I feel sure he knew how to make it out."

Isn't there a worth-while half truth in this comment? Every lawyer knows that little legal research is required in drafting a homestead declaration. If the requirements of the statute are carefully complied with, few other points need checking.

The client doesn't know this. He supposes that the lawyer has read all the lawbooks in the law office. When the lawyer refers to lawbooks in the client's presence he raises himself in the estimation of the client.

Show your familiarity with American Jurisprudence to every client. You will be surprised how much more convincing your advice will be.

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The Layman and the Courts

Jurors, Judges and Justice

by Jack Foster

EDITOR OF THE ROCKY MOUNTAIN NEWS, DENVER, COLORADO

As a newspaper reporter for a quarter of a century, I have sat before you—or your colleagues on other federal benches—on many a grim and dramatic occasion.

I have listened with awe, exhilaration and occasional cynicism, to the conclusions you have reached, to the decisions you have rendered.

But it never occurred to me that any one of you would ever be interested in hearing what I—the story-teller for the multitudes, the casual reporter to the masses—would have to say. You rest so securely within the shadow of the eagle, within the comforting arms of lifetime appointments that I had come to believe, I am afraid, that your world was yours and mine was mine, and never the twain could meet.

You are impregnable, I thought, within the rough-hewn castle of federal law.

I as a newspaperman am a shifting mirror that catches the changing colors of human life.

And so, with such different purposes in the world, I was frankly puzzled when Judge Orie Phillips invited me to speak before you this morning. I was puzzled because I could not see what I might have to say would be of any value to you in the technical discussions of law and legal procedure that are to follow.

And yet the more I thought about it, the more I realized that unless there is some bond between you, the federal judges, and me, the layman, there is no law—and without law there is no America—and without America there is, in this moment of history, no possible civilization assuring justice to the individual.

When this address was delivered by the working Editor of a great newspaper before a Conference of the Tenth Judicial Circuit, Judges Orie L. Phillips and Alfred P. Murrah instantly joined with others in recognizing it as one of the most timely, forthright and far-reaching utterances they had ever heard. They expressed the "fervent hope" that it would be read by every lawyer, judge and teacher of law. It has a "punch" and vividness which only a trained newspaperman could give it. But, after all, it is only an editor's version of the same high objectives which Arthur T. Vanderbilt urged in phraseology more customary, the same ideals of justice for which the Association and its JOURNAL *have long been contending. Few lawyers will fail to get a thrill and sense of pride from its portrayal of "humane courts" as "the only fortress" in the "everlasting struggle of mankind" for "the right to be let alone", by Government and all possessors of arbitrary power.*

True Justice a Foundation for Peace

We are gathered today within a few weeks of the anniversary of the end of a great war. That war was fought between the forces of those who believed that the right of the state is unquestioned and those who declared that the state is subservient to the will of the majority.

The latter forces—our dying sons and grieving daughters, our little people from Tincup, Colorado, from Okemah, Oklahoma, from Pecos, New Mexico—won that war. But will their victory be lasting?

There are many factors involved in the establishment of permanent world peace. But none of them is more important than the crystallization of a strong America; and a strong America is not possible, in my opinion, without a human interpretation of law and a human application of legal procedures.

The Thrills from Watching American Juries in Action

I do not pretend to know very much about law. But, like the gentleman who knows what he likes in art, I do know what gives me the ultimate thrill in the slow unfolding of the democratic processes. That thrill comes from watching an American jury in action. It comes from the realization that there, sitting in twelve well-worn chairs, are the baker and mechanic, the banker and housewife, selected to judge the alleged offense

Editor's Note: This address was delivered at a Conference convened by the Judges of the United States Circuit Court of Appeals for the Tenth Circuit, at Santa Fe, New Mexico, on July 22.

of one of their neighbors against their community and his.

These little folk—these people from our midst—were the true enemies of Nazism and Fascism. For they said: "We the multitude are capable of judging ourselves, and no power of superstate or mouthing dictator can ever match our quiet strength."

Is Our Jury System Working As It Should?

But is the jury system—the bulwark of our democratic life—functioning as satisfactorily as it should? Are the members of the jury as conscious as they should be of the overwhelming importance of their duty? Is the procedure for calling and picking a jury as smooth and efficient as it should be?

What Jurors Think of Jury Service

To get answers to these questions, I talked with a number of gentlemen in Denver who have served within the last few years on federal juries. And I would like to tell you what they said.

There was the real estate broker. He is a busy man. He counts every moment as a precious thing that should not be wasted by sitting around all morning, and perhaps all afternoon, doing nothing. He felt that even if he might be permitted to walk up and down the corridor or to call his office occasionally, he would not get so restless. He felt that the judge was aloof to his problems.

There was the eminent businessman. His life is one that moves by the clock. He feels that there is an enormous amount of preventable waste of time on jury service. He feels that somebody ought to be able to let him know when there is the likelihood that a case will come to trial, and not to call him until that time. He has been on juries before, and he doesn't think that the judge gives a tinker's dam about him.

There was the erstwhile electrician. He has served on juries repeatedly, and he likes it. He feels that he is performing an important function, and he is invariably disappointed when he is dismissed before a jury is impanelled. But he admits he has plenty of time on his hands, and he feels that a closer check should be kept on the time of cases coming to trial, for the benefit of busy men.

And then there was the laboratory assistant. He admits that there are maddening delays in jury procedure. He admits that overcrowded court facilities frequently make service distasteful. He admits that judges often give the impression of being utterly indifferent to the proceedings. And yet he declares he would be fearful of the possible results if jury selection were placed on a rapid-fire cafeteria-style basis. He said: "Yes, I dislike the delay. But still I think the slow, deliberate process of jury selection leads to the greatest possible justice to the individual."

Over-Hasty Procedure May Bring Tragedy

I was talking with this gentleman in the company of a distinguished Denver lawyer. At the beginning of his career, this lawyer was serving as a deputy in the district attorney's office. He told a story of the fearful results that can follow over-hasty judicial procedure in capricious courts.

He was prosecuting a man who was accused of the rape of his half-wit niece. Under pressure, the jury was completed sooner than expected. And the prosecution was without witnesses in the courtroom. So the judge dismissed the case, thereby removing the defendant from jeopardy. Shortly after this the defendant's brother—father of the niece—shot and killed the defendant.

Said the lawyer: "And then it was my job to try this man for murder—all because the first trial was rushed too hurriedly."

There are those jurors, to be sure, who grow impatient with the slow development of courtroom procedure. And in my opinion there is no question about the fact that in instances this procedure can be speeded up without jeopardizing the goal of justice.

In this connection I fervently regret that I was not able to hear the speech by your distinguished colleague, Chief Justice Bolitha Laws of the District of Columbia. If my own talk had been better prepared and didn't need the rewriting that frequently comes with re-reading in the cold light of dawn, I should have been able to have been here. Chief Justice Laws has earned ardent distinction for his work as Chairman of the American Bar Association's subcommittee on Improving the Administration of Justice, and I am confident he touched extensively on the question of jury procedure improvement.

But perhaps he didn't enlarge on the human side of jury service. As a newspaperman, it is difficult for me ever to separate a problem or institution of any kind from its human aspect. That's the way we have to tell a story—through people—if we wish our readers to understand it.

Jurors Take Their Duties Conscientiously

In twenty-five years as reporter and editor, I have talked with hundreds of jurors. I have listened to their woes, have heard them express their fears, have watched the troubled lines of regret cross their faces as the foreman handed in a verdict of first-degree murder.

Many of them were serving unwillingly. They deplored their loss of time and money.

Many of them had pleaded fervently to be excused—on real and, in many cases, fictitious reasons.

Some of them of course, were the more or less professional jurors who are interested only in the excitement—and fee—of the particular case they are hearing.

And yet I have found, from watching hundreds of jurors in action over the years that, when they actually come down to the job of hearing a case, they are conscien-

tious, solemn, deliberate and long-suffering citizens. They realize fully the seriousness of the assignment as citizens that they have. Despite the inept and incomplete discussion of the high importance of jury service on the part of some judges, they seem to know that this is a great and fundamental privilege of all Americans. And, as a rule, I have found, they reach a decision that is tolerant, reasonable, in keeping with the average thinking of the community.

As laymen, they do not attempt to interpret the law. They seek only, it seems to me, to offer justice to a fellow member of the human race who, they believe, has as much right in the courtroom as they do. They are not primarily concerned as to whether the prisoner before them ought to be in jail. If he should be, they find him guilty. If they think he shouldn't, they acquit. The issue is as simple as that in the mind of the average juror.

An Instance of Sensible Justice

In this connection, I am thinking about a case in federal district court two years ago that absorbed my interest because of the uniqueness of the charge. It was a case involving treason. It was a case in which three Japanese-American girls in a relocation camp in southern Colorado were charged with treason and conspiracy to commit treason.

One of the distinguished gentlemen in this audience will remember the case well. He tried the case. He had difficulty, as all of us did, in pronouncing the last name of the leader of the defendants. And so he resorted to referring to her by her nickname—Toots. It was, I assure you, a rare privilege to hear a federal district judge from this bench of highest dignity refer to a defendant as "Toots".

But, at any rate, these Japanese-American girls were accused of having helped two German prisoners of war escape from a nearby prison camp. It was clearly obvious to the jury that they were guilty. But it likewise was obvious that they had helped these men escape out of bitterness, anger and despair because they had been torn away from their California homes—not in an effort to hinder our country's war effort.

So the jury found them innocent of treason and guilty of the lesser charge of conspiracy to commit treason. It was a contradictory verdict, to be sure, yet one that, in my opinion, was entirely within the thought of a tolerant and reasonable community. To me this federal jury was carrying out its responsibility in the highest sense of the word.

It was revealing in a practical way the truth of the phrase in one of the reports of the Section of Judicial Administration of the American Bar Association, adopted in 1938, which you gentlemen will remember says:

> . . . trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community.

Attitude of Judges Is Sometimes Unfortunate

But do the judges on the federal bench maintain, without exception, this humanness that is an inseparable part of a jury when it is functioning best? By their mannerisms in the courtroom, by their attitudes toward the jury, the lawyers, the working press, do they carry across the essential idea that the law, above all, is a human instrument, and they are human prophets of this law?

Sometimes reluctantly I doubt it. Jurors and lawyers alike have recounted to me examples wherein it seemed to them that federal judges have acted in an unnecessarily aloof, seemingly "better than thou" manner.

Just before I left Denver on the beautiful flight to Santa Fe, I told a friend that I was to speak before you gentlemen on "The Relation Between the Federal Courts and the Layman".

He replied caustically: "Is there any?"

A Challenge of a Restrictive Ruling

He was a newspaperman. He was thinking, I am sure, of a certain annoying rule that exists in the federal district court in Denver. At least it's annoying to us newspapermen—and I have wailed on occasion to my good friend, the district judge, about it.

This court is only one of several types of offices and bureaus within a large federal building. Several years ago, for some reason I do not know, the federal district judge, now gone after years of faithful service to the highest tribunal in the heavens, decreed that at least so far as newspaper photographs were concerned the entire building came within his jurisdiction. No photographs of defendants might be taken anywhere in the building.

This rule has been perpetuated by the distinguished present district judge. A short time ago the newspaper of which I am editor forgot this rule and took a photograph in the marshal's office. This was during a recess of the trial; it was far from the courtroom; the defendant had readily given her consent. Yet we were threatened with contempt of court by our friend and otherwise pains-takingly helpful district judge.

Judges Should Not Assume Arbitrary Powers

Personally I feel that in the event we had been cited for contempt and had fought the case—as we certainly should have done—we would have won. I personally believe that such citation for contempt on these grounds would have been a violation of the constitutional guarantees to a free press. But that is not the point. The point is that here again, in my humble and perhaps prejudiced opinion, is an example of a federal judge holding himself unnecessarily far apart from the public and the press, assuming to himself what seems to me to be unnecessarily arbitrary powers.

If the taking of this photograph had interfered with the processes

of obtaining justice, then, of course, contempt was involved. But if it hadn't—and, of course, it hadn't—then what reason was there for even the threat of invoking this rule?

Human Factors in The Courtroom

Yet I am, I like to believe, a human being myself, and if I were in the position of authority that tradition gives a federal judge I am not sure but that I might make some rules of my own. There is, I suppose, by the very nature of events, a greater aloofness on the part of the federal judge than there is on the part of the state judge.

The federal judge sits on the bench for life unless Congress removes him for some flagrant offense. (And what federal Judge could possibly wish to disappoint Congress after their most commendable act of last Saturday?)

The state judge, of course, sits at the will of the electorate.

With such a setup, if I might use the word, you gentlemen are naturally not as concerned with the cry of the multitude or the hue of the press as you might otherwise be if the shadow of November were just ahead of you.

I am not saying that this is not a good thing. The necessity of pleading with the public for votes every four or six years is a grim and debilitating ordeal. I don't blame you for the rosy satisfaction that you must take out of the knowledge that yours is a: "til death do us part" marriage.

The Law Must Be Human As Well As Just

But when this satisfaction tends to blind you to the human factors in the courtroom, as it conceivably can, then I think a great deal has been lost. When this sense of security makes you inconsiderate of the none-too-bright defendant—the annoying lawyer objecting with the force of a house-fly, the blundering witness—when you brush aside these human irritations with an arbitrary sweep of the hand, then the law suffers, I believe, immeasurably.

For the law must be human if it is to be a law of justice. And the interpreters of that law must be human and reasonable themselves if they are to serve faithfully the ends of truth.

There are two possible kinds of law: The law of tyranny. And the law of justice.

If the law becomes high-handed, arbitrary, oppressive, tyrannical, then it breeds fear, distrust, confused resentment and subversiveness in the hearts of the people. If, on the contrary, the law with high resolve dedicates itself to the pursuit of justice—not revenge—to the search for a fair balance of human truth—not punishment for its own sake—then the law becomes the great and gleaming hope in a chaotic world to which the people can cling.

Simple Acts of Justice Win the People

I am thinking of a little story of a simple person to illustrate this fervent faith of mine. This was the prohibition era. An Italian woman had been brought before a federal district judge for having sold some wine. She was a widow, the mother of five children. It was her second offense.

The district attorney, with all the majesty of revenge in his soul, demanded that she be given the limit. But the federal judge, after listening to his high murmurs of indignation, said:

"And so you are through. All right, sir, answer me this? If I should give this woman a long sentence, who would care for her children? Who would feed them? Who would clothe them? Who would give them even a small chance to become constructive citizens in society? No, my dear sir, my job is not to punish. My job is to render justice."

He gave this woman a meager sentence. And he was right. And the public, who read the story in our newspaper, believed that he was right. And the law, through this simple act of granting justice to a little person, gained new glory, I think, in the minds of our people.

An Editor's View of the Essence of Law

Since I first accepted this assignment from Judge Phillips to speak before you, I have been thinking more profoundly than ever before about what it seems to me is—or should be—the essence of law. And I have been talking to myself, as men will, when they are struggling to some conclusion. And I have been saying:

"Law is a measuring stick of conduct. It is the rule established by men of good will to produce the greatest contentment to the greatest number in a world that otherwise would have no order. But it is not an end unto itself. It is rather an expression of principles that change as history changes, that shift as the need for mercy and charity increase.

"Brought into existence by the mind of man, the law has all of man's frailties. Therefore being strong in one generation and inadequate in another, as the races of men are, it must be subject to perpetually changing interpretation. But, throughout these changes in interpretation, it must always have as its indestructible goal the burning resolve that the lowliest of men can come before it and be judged without prejudice, without malice, without contempt. The law is—or should be—and must be—the unassailable faith of a free people who voluntarily have accepted these restraints so that none of their number need go to the grave with the black belief that life was set against him."

The Lowly Need the Kindliness of Law

As a matter of fact, I have said to myself, the law should be interpreted primarily to the ends that justice comes to the poor and lowly, the sick and forsaken. The great do not need the law. They, by virtue of their wealth, could be mercy unto themselves, could be judges without need for rules. It is the lowly

(Continued on page 686)

"Open Forum" at Atlantic City on Rule for Condemnation Cases

In connection with the amendments prepared by the Supreme Court's Advisory Committee on the Rules of Federal Civil Procedure, all members of the Bar should note that the Condemnation Sub-committee of the Advisory Committee has prepared and submitted a proposed Condemnation Rule 71A for the information of the bench and bar and for discussion at an open forum of the American Bar Association to be held at Atlantic City on October 28.

The opinion, suggestions and criticisms of judges, lawyers and teachers of law are sought. This draft, with such suggestions as are developed at that open forum, will be finally considered by the Advisory Committee for submission to the Supreme Court of the United States with that Committee's proposed amendments to the Federal Rules of Civil Procedure, which were submitted to the Court on August 26.

The sub-committee which prepared the draft consists of Edgar B. Tolman, Chairman, George Donworth, and Judge Charles E. Clark. The Advisory Committee has not yet acted on or considered the draft. An article and an editorial in this issue and also the article following the text of the proposed Rule, comments on some aspects of the drafts.

RULE 71 A. CONDEMNATION OF PROPERTY FOR PUBLIC USE

(a) APPLICABILITY OF OTHER RULES. The procedure for the condemnation of property under the power of eminent domain is governed by the provisions of the Rules of Civil Procedure for the District Courts of the United States, except as otherwise provided in this rule.

(b) JOINDER OF PROPERTIES. One or more separate pieces of property sought to be taken for the same uses, whether in the same or different ownership, may be proceeded against in the same action.

(c) PROCESS.

(1) Notice; Delivery. Forthwith upon the filing of the complaint and in lieu of summons the plaintiff's attorney shall prepare and deliver to the clerk for his records and to the marshal for service, or to a person specially appointed therefor, notices directed to all the defendants named or designated in the complaint, and shall do likewise as additional defendants are added. Separate and additional notices directed to any one or more of the defendants may be so prepared and delivered. Before the value of any particular lot, parcel, or tract of land is ascertained and awarded, the owner of that tract or of any encumbrance, lien, easement or right therein shall be made a party to the action and served with notice as in this subdivision provided. The notice, its delivery, and service has the same effect as that of the issuance and service of a summons provided for in Rule 4.

(2) Same; Form. The notice shall state the court, the title of the action, the names of the defendants to whom it is directed, that the action is to condemn property for public use, a description of the property sufficient for its identification, the interest sought to be taken, the authority for the taking, the public uses for which the property is sought to be acquired, the time within which and the place where the defendants shall

serve their answers, and that in case of failure to do so they will be deemed to have consented to such taking and to the authority of the court to proceed to fix the compensation therefor. The notice shall conclude with the signature of the plaintiff's attorney and an address within the district in which the action is brought where the plaintiff's attorney may be served. The notice need not contain a description of any property other than that sought to be taken from those to whom it is directed.

(3) Service. The notice shall be served in accordance with the provisions of Rule 4, except that:

(i) Copies of the complaint need not be served but the plaintiff shall deposit with the clerk at least one copy of the complaint for the use of the defendants, and shall deposit additional copies at the request of the clerk or of counsel for defendants.

(ii) The plaintiff's attorney may cause a copy of the notice to be sent by registered mail, return receipt requested, to the last known address of any defendant residing within or without the state, but in case of a defendant residing within the state the marshal or the person specially appointed for service shall have made a return to the effect that he was unable to find the defendant therein.

(iii) Service of a notice upon defendants, whether residing within or without the jurisdiction of the court, whose names are known but whose addresses are unknown, and upon defendants who are unknown, shall be made by the plaintiff's attorney by publishing a notice directed to them by name and to "Unknown Owners" as follows: The notice shall be published twice in a newspaper published in the county where the property is located, or if there is no such newspaper then in a newspaper having a general circulation where the property is located, the second publication to occur at least one week, but not more than two weeks after the first publication. Before service is made under this clause (iii) plaintiff's attorney shall file with the court a certificate that he has caused diligent inquiry to be made and nevertheless has been unable to ascertain the present residence and whereabouts of those defendants whose names are known but whose residences are unknown or the names of other persons who may have an interest in the land as owners, holders of encumbrances or other liens.

(iv) Service by mail is complete upon the date of the return of the post office receipt showing either delivery or inability to deliver the notice sent to defendants by registered mail. Service by publication is complete upon the second publication.

(4) Proof of Service. Service by the marshal, his deputy, or one specially appointed by the court, shall be proved as provided in Rule 4(g). Service by mailing and publishing shall be proved by the certificate of an attorney for the plaintiff showing the method of service upon each defendant and, if service is by publication, the attorney shall attach to the certificate a newspaper copy of the published notice with the name and dates of the newspaper marked thereon. The certificate of the plaintiff's attorney has the same force and effect as the return of the marshal. Failure to make proof does not affect the validity of the service.

(5) Amendments of Notice and of Proof of Service. At any time in its discretion and upon such terms as it deems just, the court may allow any notice or proof of service to be amended, unless it clearly appears that material prejudice would thereby result to the substantial rights of the defendant.

(d) ANSWER. Within 20 days after the completion of the service of the notice upon him, a defendant shall serve his answer on the plaintiff's attorney at the place designated on the notice. The answer shall identify the property in which the defendant claims to have an interest, state the

NOTE. By lines 19-23 there has been incorporated into this subdivision a requirement for notice to all owners before the value of their property is ascertained or paid. It assures due process and a full hearing before any owner's rights are disposed of. It leaves the Complaint to be governed by rule 8A.

nature and extent of the interest claimed, and state all objections and defenses. All objections and defenses not so asserted are waived, but the right to share in the distribution of the award and to present evidence of value as to his share in the award is not waived by any failure to answer. No other pleading, and no motion, asserting any additional defense or objection shall be allowed.

(e) AMENDMENTS OF PLEADINGS. Without leave of court the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (h) of this rule. Copies of amendment need not be served but notice of the filing of each amendment shall be served upon the parties affected thereby in the manner provided in Rule 5(b), if they are not in default for failure to serve an answer, and, if they are so in default, in the manner provided for in Rule 4 except as otherwise provided in subdivision (c) (3) (ii) of this rule. At least one copy of each amendment shall be deposited with the clerk of the court for the use of the defendants, and the plaintiff shall file additional copies on the request of the clerk or counsel for defendant. Within 20 days after service upon a defendant of a notice of the filing of an amendment, he shall serve his answer thereto, in the form and manner and with the same effect as provided in subdivision (d) of this rule. A defendant shall have the right of amendment prescribed by Rule 15.

(f) SUBSTITUTION OF PARTIES. If a defendant dies or becomes incompetent or transfers his interest, after the service of notice upon him, the plaintiff shall not be required to give any notice to any person nor to have any other person substituted as a party because of death, incompetency, or transfer of interest. Substitution of the proper parties may, however, be ordered by the court upon motion and notice of hearing as provided in Rule 25 (a), (b), and (c), but if the motion and notice of hearing is to be served by the plaintiff upon persons not parties, service thereof shall be made in the manner provided for in Rule 4, except as otherwise provided in subdivision (c) (3) (ii) of this rule.

(g) TRIAL.

(1) <u>The Tribunals.</u> The tribunals by which the value of the property sought to be taken for public use, and the just compensation to the owner thereof are to be determined, shall be the tribunals now specified by Acts of Congress for the trial of condemnation cases.

(2) <u>By Jury.</u> If there are no Acts of Congress specifying the tribunals before which the issues of value and compensation shall be tried, any party may demand a trial by jury of those issues by filing with the clerk of the court a demand therefor in writing at any time after the commencement of the condemnation proceeding and not later than 10 days before the trial. A copy of the demand for jury trial need not be served. A party may withdraw his demand as to any lot, parcel or tract of land by stipulation of the parties affected thereby who are not in

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NOTE: This subparagraph (1) provides a simplified and uniform trial procedure for all cases involving the exercise of the power of eminent domain of the United States with two exceptions: (a) Congress has provided for the ascertainment of value and just compensation by a trial before commissioners instead of a trial by jury in TVA proceedings. (b) Congress has also provided that in proceedings for the condemnation of property by the commissioners of the District of Columbia, the trial shall be by a jury of five. A condemnation case is a proceeding <u>in rem</u>; it was not triable by jury at common law and is therefore not included in the Constitutional provision of the Seventh Amendment that "..., the right of trial by jury shall be preserved ... ." Subparagraphs (2) and (3) closely follow the provision of Rule 38 for trial by jury on demand and otherwise trial before the judge, in all cases where the United States is plaintiff.

default or by order of court upon motion and notice. The jury shall be selected and impaneled as in other civil actions. The court in its discretion may permit the jury to view the property.

(3) By Court. Unless a jury trial has been demanded pursuant to paragraph (2) of this subdivision, trial of all issues shall be by the court.

(4) Compliance with State Procedure. If the action involves the exercise of the eminent domain of a State, the trial of the issues of value and compensation shall be as specified by the statutes of the States in which the property is situated.

(h) DISMISSAL OF ACTION.

(1) As of Right. At any time prior to the vesting of the title sought to be acquired in the action, the plaintiff may dismiss the action in whole or in part, without court order, by filing a notice with the court setting forth briefly and concisely a description of the property as to which the action is dismissed, unless the plaintiff has taken possession of, or some other interest in, the property as to which the plaintiff seeks to dismiss.

(2) By Stipulation. The action may be dismissed in whole or in part, and as to any person or property by filing a stipulation of dismissal.

(3) By Order of the Court. At any time before compensation has been determined and paid, the action may be dismissed by the court after motion and hearing, except that the action shall not be dismissed as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken any other interest but just compensation shall be awarded in the action for the possession or other interest so taken.

(4) Effect. Except as otherwise provided in the notice, stipulation of dismissal or order of the court, any dismissal is without prejudice.

( ) EFFECTIVE DATE. This rule will take effect on the day which is 3 months subsequent to adjournment of the _____ regular session of the _____Congress, but if that day is prior to _____1,_____, then this rule will take effect on _____1,_____. This rule governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

FORM 28. NOTICE: CONDEMNATION

District Court of the United States for the Southern District of New York

CIVIL ACTION, FILE NUMBER .....

UNITED STATES OF AMERICA
v.
1000 ACRES OF LAND IN..... AND (here insert the name of all the known owners, holders of encumbrances and other liens) AND UNKNOWN OWNERS, DEFENDANTS.

Notice of filing complaint

To .....:

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the District Court of the United States for the Southern District of New York, in the United States Court House in New York City, New York, for the taking (here state the interest sought to be taken, as *"of an estate in fee simple"*) for public use (here state briefly the public use, *"as a site for a post office building"*) of the following described property of which you are the owners or parties in interest.

(Here insert brief description of the property owned by the defendants to whom the notice is directed.)

The authority for the taking is (here state briefly, as "the Act of ....., ... Stat. .....; U. S. C., Title ....., § ....."). You are further notified that within 20 days after the service of this notice upon you, you are required to file in the office of the clerk of the District Court of the United States for the Southern District of New York your defense and objections to the taking of your property for public use, your interests in the property, and your rights to compensation.

All defenses and objections, not so asserted are waived, except the right to share in the distribution of the award and to present evidence of value.

In case of your failure so to answer the complaint your default, and judgment of condemnation by default of that part of the above described property owned by you, or in which you have any interest, will be entered.

.....
United States Attorney.
Address: .....
(Here state an address within the district where the United States Attorney may be served, as *"United States Court House, New York, N. Y."*)

Dated.....

FORM 29. COMPLAINT: CONDEMNATION

District Court of the United States for the Southern District of New York

Civil Action. File Number .....

UNITED STATES OF AMERICA
v.
1000 ACRES OF LAND IN..... AND (here insert the name of all the known owners, holders of encumbrances and other liens) AND UNKNOWN OWNERS, DEFENDANTS.

Complaint in Condemnation

1. The action arises under the Act of..... ..... Stat. .....; U. S. C., Title ....., §.....

2. The action is brought for the taking of private property for public use and for the ascertainment and award of just compensation to the owners and parties in interest.

3. The public use for which the property is sought to be taken is.....

4. The interest sought to be acquired in the property is .....

5. The property so to be taken is ..... or (described in Exhibit A hereto attached and made a part hereof).

6. The owners and holders of encumbrances and other liens as of the date of the filing of this complaint as appear from the public records and from diligent search and inquiry are those named in the title as defendants.

7. In addition to the persons named, there are or may be others who have or might claim some interest in the property sought to be taken for public use, whose names, addresses and whereabouts, are unknown to the plaintiff, and on diligent inquiry have not been ascertained. They are made parties to the action under the designation "Unknown Owners."

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

.....
United States Attorney.
Address: United States Court House, New York, N. Y.

Comment on Proposed Amendments of Civil Rules

The Advisory Committee's submission of its proposed Amendments was made on August 26. The release of the draft condemnation rule for study was authorized by the Committee on September 6. The time before this issue of the JOURNAL goes to press (September 9) has been insufficient to permit our preparation of an adequate analysis and comment.

Walter P. Armstrong, of the Board of Editors, who has been following the amendments closely, prepared for the West Publishing Company an informative analysis and well-annotated commentary, which has been published in the Federal Reporter (156 Fed. 2nd, No. 2, pages xix-xxxix) and the Federal Supplement (Vol. 66; No. 3; Advance Sheets, pages XIX-XXXIX), and in 5 F.R.D. 339. As nearly all of our readers have access to these Advance Sheets, we refer to his article those who wish to read an analysis of the amendments. The condemnation rule, of course, is not included.

In his commentary on the proposed amendments as to "discovery," Mr. Armstrong said, in part:

"The most perplexing problem that confronted the Committee in dealing with discovery was the extent to which a party should be permitted to delve into an adversary's investigation file which contains statements of witnesses, photographs, maps, etc., procured in preparation for trial. The First and Second Drafts merely provided that the court could impose designated restrictions 'upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial.' This left the matter entirely at the discretion of the court. It was suggested that it did not solve the problem nor make for uniformity because the probable result would be that each district judge would adopt in his own district an inflexible rule.[1] Indeed, the Committee itself deprecated the fact that the proposed amendment did not establish any standard for the exercise of judicial discretion. In a tone of despair it appealed to the Bar: 'If members of the profession can formulate a general statement of the standard for exercising discretion the Committee will welcome it and give it careful consideration.'[2]

"After the release of the Second Draft the Circuit Court of Appeals for the Third Circuit dealt with the subject in *Hickman* v. *Taylor*.[3]

1. Armstrong, Second Draft of Proposed Amendments, page 498.
2. Second Draft, pages 39, 40.
3. 153 F. 2d 212.

In that case written interrogatories were propounded to the defendants, Taylor and Anderson, and they were asked to produce and file statements of witnesses which had been taken by their attorney, Samuel B. Fortenbaugh, Jr., Esq., and further, that their attorney, Mr. Fortenbaugh, be required to reduce to writing oral statements made by witnesses to him. This interrogatory was objected to and in connection with the hearing of the objection Mr. Fortenbaugh made a written statement and gave an informal deposition explaining the circumstances under which he took the statements. Mr. Fortenbaugh was not expressly asked in the deposition to produce the statements. Later, however, an order was entered requiring Taylor and Anderson and Mr. Fortenbaugh to file the written statements, and to reduce the substance of the oral interviews to writing and to file the writing. For disobedience of this order, Taylor and Anderson and Mr. Fortenbaugh were adjudged in contempt by the District Court for the Eastern District of Pennsylvania, sitting en banc.[4]

"The Circuit Court of Appeals for the Third Circuit, sitting en banc and aided by amici curiae, reversed. In his opinion Judge Herbert F. Goodrich declared that the statements were not privileged under the testimonial rule, which excludes confidential communication between client and attorney; he held, however, that Rule 26 expressly limits the scope of examination to matters 'not privileged' and that 'privileged' used in this connection has a broader meaning than testimonial exclusion and extends to 'the work product' of the lawyer, such as the statements in question. The Committee criticizes the decision and opinion in *Hickman* v. *Taylor*: 'The Advisory Committee, one member disagreeing, questions the view in *Hickman* v. *Taylor*, supra, that the word "privileged" in Rule 26 (b) encompassed the situation before the court in that case. The Committee believes that the term "privileged" as used in that rule was not designated to include anything more than that embraced within the rule of testimonial exclusion regarding privileged communications as developed under the applicable laws of evidence, both common-law and statutory.'[5]

"The Amendment the Committee now proposes is: 'The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.'[6]

"It may be that this is the best that can be done if a position is to be taken between complete exclusion and complete discovery. The Amendment, however, provides a test but little more definite than that of the discretion of the district judge which was the criterion of the Second Draft, against which criticism was leveled.[7] It will greatly increase the work of the trial judges, and in districts where there is a congestion of work there will be a temptation to deal summarily with applications under the amendment and perhaps to adopt a fixed standard.

"There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar. The Amendment was first fully released when the Report was filed with the Court; therefore there has been[8] and will be no opportunity for general discussion. This in itself is unfortunate. Moreover, the Supreme Court has now granted certiorari in *Hickman* v. *Taylor*;[9] it would be helpful if the Bar could discuss and the Committee consider the Amendment in the light of the opinion of the Supreme Court in that case.

"The draftsmanship of this Amendment leaves something to be desired. Probably one of its primary purposes was, in exceptional cases, to broaden the right of discovery beyond the limitation imposed by *Hickman* v. *Taylor*. Yet its approach is negative. It is placed under Rule 30 (b) titled 'Orders for Protection of Parties and Deponents'. The clear implication is that in the cases of hardship provided for, statements of witnesses and other similar objective preparations for trial are discoverable even when they are the 'work product' of a lawyer. This construction is further strengthened when the Amendment is considered in connection with the broad scope of pre-trial inquiry specifically permitted under Rule 26, and made expressly applicable to all methods of discovery. It will probably be sometimes argued, however, that the Amendment is a further immunity to discovery and is in addition to the privilege accorded a lawyer under *Hickman* v. *Taylor*.

"It might have been better if the Rule had been both affirmatively and negatively stated and added to the scope of the examination definition in Rule 26, or if the scope of examination with this addition had been placed in a separate Rule and this Rule made expressly applicable to discovery under Rules 26, 33 and 34."

4. 4 F.R.D. 479.
5. Report page 46.
6. Rule 30, Report page 39. The Committee is thought not to have been unanimous in formulating this Amendment.
7. Armstrong, Second Draft of Proposed Amendments, page 497.
8. An exception is the vigorous discussion of both *Hickman* v. *Taylor* and the Amendment, at the last Judicial Conference of the Third Circuit. Among the participants were counsel and amici curiae in *Hickman* v. *Taylor*. See transcript, Ninth Annual Judicial Conference of the Third Judicial Circuit of the United States, page 21 et seq.
9. On April 22, 1946, certiorari was denied. 66 S.Ct. 961, 90 L.Ed. 848. A petition for rehearing was filed by the petitioner and supported by a brief by the United Railroad Workers of America, C. I. O., as amicus curiae. The petition for rehearing was sustained and the writ granted May 27, 1946. 66 S.Ct. 1337, 90 L.Ed. 1068. The case is number 47 on the docket for the October Term, 1946.

Justice Holmes Was Not on a Ladder to Hitler

by Charles W. Briggs
OF THE ST. PAUL, MINNESOTA, BAR

There appeared in the November (1945) and June (1946) issues of the JOURNAL (31 ABAJ 569 and 32 ABAJ 328) two articles by Ben W. Palmer, in which he advances the thesis that the philosophy of Mr. Justice Holmes "leads straight to Hitler." The author puts the eminent Justice in the light of embracing a pseudo-liberalism to cloak totalitarianism. He pictures the outstanding philosopher in American law as ascending a ladder from Hobbes, Kant, Hegel and Treitschke, who taught, among other things, that law emanates from and is sustained by force.

Whatever affiliation in thought Mr. Justice Holmes may have had with the philosophers just named, or with others of comparable thinking, both before and after him, it is the purpose of this article to question Mr. Palmer's conclusion that the Justice was a protagonist of Hitlerism. There will be pointed out the underlying fallacy that lurks in "natural law" concepts to which the author beseeches our return as an antidote to totalitarianism.

Holmes' Philosophy as to the Law

What did Holmes believe the law is? He was a positivist. He was anything but a disciple of natural law. He spoke plainly, and never proceeded from mere postulates, nor indulged in abstractions. He never lost sight of the inductive method in declaring the common law, nor did he ever question the privilege of men to indulge in legislative experimentation to regulate their lot. He believed that man, speaking collectively, made his own law; that law is a sovereign's command and nothing else; that law in a democracy is necessarily the command of the dominant majority of the social group. He maintained that force is the *ultima ratio* of the law. This led him straight to the conclusion that individual men have no rights not recognized by the commanding sovereign. Inalienable rights never existed in his philosophy. He used this pointed language:

> Just so far as the aid of the public force is given a man he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity.

He comprehended no "brooding omnipresence in the sky" that enacted laws for human government. He dismissed the transcendentalist as he did all spiritualistic mediums. These were his views in brief. Calling him a pragmatist, a materialist or a utilitarian, neither proves nor disproves the soundness of his views.

Does entertaining the positivist view of Holmes that law depends upon the exercise of sovereign power rank one either with Hitler or with Stalin? Must one accept the philosophy of natural law in order to escape such an association? The answer in each case must be decidedly "No." One may be a positivist with Holmes and at the same time a staunch supporter of popular sovereignty which lies at the foundation of democracy as we have conceived it. In other words, one may escape responsibility for Hitler and still maintain that law is a sovereign command and nothing more. Agreement with Holmes permits respect for the dignity of the individual man and denial that man should be a mere instrument of the state. We will have much or little government or law as we choose, and our choice will be our own sovereign command.

The Philosophy of Natural Law

Natural law, it is said, "signifies the laws for the direction of human conduct which proceed immediately and infallibly from the Deity or the intelligent and rational Nature which animates and directs the universe." This law is asserted to be an essential and eternal code which the conscience and rational powers of man is capable of perceiving. The theory of natural law was invoked as a weapon by champions of popular demands against monarchical power. Though entirely abstract it has served its purpose. It was pitted against the asserted "divine right of kings", which manifestly has succumbed to the power of the people. It was a dogma that helped win the battle for sovereignty of the people. Why use it now? It might be used by a duly inspired leadership of a majority to launch a dictatorship. Socialism can be and is being achieved by recourse to revelation of natural law. Much can be accomplished in this field by taking as textual the assertion that "all men are created equal and endowed by their Creator with certain inalienable

rights." "Life, liberty, and the pursuit of happiness" present many facets to many people. Adherents to the theory of natural law would be hopelessly split on the institution of private property and private enterprise: The majority would rule. The pretense that "all men are created equal" is at variance with nature. It has brought persistent strife and endless conflict to our political, social and economic life. There never has been any uniform implementation of this assumption even by the teachers of natural law themselves.

Danger in Philosophy of Natural Law

Why be concerned then with a philosophical subject that on its face appears to be so speculative and academic? Because there is a real danger lurking in the philosophy of natural law. Reliance upon it lulls the people into a false security, and relaxes their vigilance in protecting their liberties. It relieves them of a sense of responsibility for their own good or ill. Reliance upon a divinely inspired and administered code of absolute secular laws can result in the assumption of kingship by divine right, dictatorship or practical anarchy, according to the minds and motivations of the influential interpreters. Such a philosophy is a dangerous fallacy, because it contributes to public inertia. It produces dialectical discussion which obscures realities, conditions and trends passing unheeded under the very noses of the legal voyageurs into its mysteries.

Austin the Positivist

Justice Holmes was of the Austinian school. Holmes' insight, due to his observation of a long period of experience with popular sovereignty and the growth of legislation touching ever broader fields of human endeavor, was practical and realistic. Austin, in his *Philosophy of Positive Law* taught that positive law consists of rules set as rules of conduct by a sovereign to the members of an independent political society wherein the author of the law is supreme. Before him Erskine in his *Principles of the Law of Scotland* taught that "the law is the command of a sovereign containing a rule of life for his subjects."

Austin held that all common or customary law, as did the Roman *jus gentium*, exists by authority of a sovereign. He explained that custom is transmuted into positive law only when it is adopted as such either by being expressly embodied into statutes promulgated by the sovereign authority, or implicitly by the decisions of the courts of justice which are enforced by the power of the state; that all judicial decisions derive their legal force by tacit command or acquiescence of the state whose officers the judges are. His analysis becomes more unassailable as we witness how judicial decisions slowly but surely respond to the will of the people in a popular sovereignty.

Can we ever get away from the fact that "law is what the judges say it is," even in their application of constitutional and legislative provisions? Even Sir Edward Coke was pitting judge-made common law against King James, and fought to the last against any interference by Chancery with harsh decisions under that law. The "case system" almost universally used in our law schools, recognizes that law is found where it is made.

Legal Positivism v. Natural Law

Austin reasoned that "until clothed with legal sanctions by the sovereign one or number (meaning democracy) the customs are merely rules set by opinions of the governed and sanctioned or enforced by morality; though when they become the reasons of judicial decisions upon cases and are clothed with legal sanctions by the sovereign one or number, the customs are rules of positive law as well as of positive morality." (Parenthesis supplied.)

Pointedly does Austin reject the philosophy of natural law in this criticism:

> In consequence of the frequent coincidence of positive laws and rules of morality, and of positive laws and laws of God, the truth, nature and foundation of positive law is often absurdly mistaken by writers upon jurisprudence. Where positive law has been fashioned on positive morality or on the law of God they forget that the copy is the creature of the sovereign and impute it to the author of the model.

Conflict Between "Human" and "Divine" Law?

Austin says: "A law which exists is a law, though we happen to dislike it, or though it vary from our assumed standard." He quotes Blackstone's statement in the Commentaries "that the laws of God are superior in obligation to all other laws. . . that human laws are of no validity if contrary to them, and that all valid laws derive their force from that Divine original." Then he says:

> The meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: That no human law which conflicts with the Divine law is binding. Now, to say this, is sheer nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act I shall be tried and condemned, and if I impugn the validity of the sentence, on the ground that it is contrary to the law of God, the ultimate minister of justice (videlicet, the hangman) will demonstrate the inconclusiveness of my reasoning.

He says further:

> True, we speak of law and justice as opposed to each other; but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. But, in truth, law is itself the standard of justice. What deviates from any law is unjust with reference to that law, although it may be just with reference to another law of superior authority. The judge who habitually talks of equity or justice—the justice of the case, the equity of the case, the imperious demands of justice, the plain dictates of equity—forgets that he is there to enforce the law of the land, else he does not administer that

> justice or that equity with which alone he is immediately concerned.

Blunt words, these, and they command attention.

Natural Law Is an Abstraction

The burden of proof is on the School of Natural Law, and it has never been sustained. We must deny its postulates unless we are to be involved in the grossest contradictions, ambiguities and nonsense. The utter lack of harmony and consistency in natural law as expounded by fallible humans, is illustrated by the fact that classical writers of the Roman period, in agreement with Aristotle, held the institution of slavery to be the creature of the *jus naturale* or *gentium*. This Roman Law is considered by the exponents of natural law to have been one of the ancient refueling stations on the road to revelation of the law of nature through instinct, sense or conscience.

Plato supported abolition of the family as being in accord with natural law. Under Blackstone witches were burned and culprits hanged for theft of a shilling, or poaching for a rabbit. That the troublesome distinction between *malum in se* and *malum prohibitum* has practically disappeared from our law is a tribute to the thinking of Holmes. He thought that talk about morals and sin should be eliminated entirely from the law, and that the inquiry should be: "What is the law emanating from sovereign power?"

Varying Concepts of Human Rights

There has never been any statement of a code of natural laws. We are furnished only a statement of postulates in the most general terms. It is said that "man is endowed with inalienable rights—life, liberty and the pursuit of happiness." But history affords no evidence of permanent means of enforcement of those rights. It does present an astounding assortment of taboos and revelations of moralists and prophets as to how human conduct should be attuned to eternal and absolute standards. It affords a kaleidoscopic picture of varied concepts of what liberty humans should enjoy, as manifested by systems of laws.

The same is true as to "the pursuit of happiness." Life itself has been taken or put in a strait-jacket according to the exigencies of the times and the mood of the citizenry. The people of the United States in recent years have undergone radical changes in their notions about liberty. We have gone far in the direction of depriving individuals of the privileges of choice of action and non-action, of the free acquisition, use and preservation of private property and of freedom of private contract. It is sufficient to call attention to laws regulating relationships between employer and employee, laws relating to production and prices and tax laws which impound income and property for distribution according to social needs. We even obstruct freedom of opportunity and penalize the strong.

Once *laissez faire* was revered in our law. Now it is condemned. Who derived "economic democracy" from natural law? Can that be inaugurated without force? What is it anyway? Where, if at all, are the standards for age-old variations in rules of conduct to be found in the law of nature? And, we may ask, just when has man been complying with the law of nature?

Part of Abraham Lincoln's philosophy of life was as follows:

> Property is the fruit of labor; property is desirable; it is a positive good in the world. (That some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise).
>
> Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.

Have we departed from this philosophy? If we have, what exponent of the law of nature is to tell us whether we or Lincoln are right?

What primordial law of nature moved the drastic changes in constitutional interpretation? Now the most intimate and vital affairs of our society are governed by legislation and administrative regulations promulgated thereunder. Legislative delegation of power need declare a policy for executive guidance bounded only by such words as "fair, just and reasonable." The common law is eclipsed and outrun in the lawyer's work-day, and in his client's concern. In a vast accumulation of Acts and Regulations and interpretative decisions the lawyer must seek in vain any co-ordinating Providential purpose. Of course every class and every individual aggrieved by what appear to be existing rules makes the age-old appeal to reason and nature. A fruitless appeal. There is engraved nowhere eternally recognized standards in the mundane matters of social and economic adjustment. In the end law in a democracy will always be a balance of convenience confirmed in the ballot box on the basis of human experience, and compelling necessities. There the sovereign power of the people over law is manifested. There they choose or approve their lawgivers.

Law Results from Rationality

All law results from whatever rationality men are capable of applying in determining what is for their good. Self-interest, self-preservation and acquisitiveness have always been of the very nature of man, and he has always formulated his rules of conduct accordingly. But opinions differ as to how these desires can best be served. Law making is a trial and error method necessarily resulting in a compromise, as witness the Constitution of the United States. The best of minds, the most unimpeachable of consciences entertain conflicting views as to what is in "the eternal code of Heaven."

What does the eternal law or *Logos* tell us about prohibition, polygamy, arbitration of labor disputes, wage and price fixing, nationalization of business, tariff policy, commerce or taxation? What does it tell us about new principles of inter-

national conduct now being forged at the Nuremberg trials, and in The United Nations? We are left with no answer.

What is done will reflect man's own judgment and experience as best it can, in the light of conditions that have to be dealt with. Force will be the *ultima ratio*. It is inconceivable how any moral precept can hold as an enforcible rule without the exercise of sovereign force. And plenty of force is evident in the precedent creating tribunals of victorious nations. The best we can do is to say with Carlyle, "Alas! The ideal has always to grow in the real and to seek out its bed and board, often in a very sorry way." Will Durant would add this: "It is a bitter thing to realize; but society is founded not on ideals, but on the nature of man. His ideals are as like as not an attempt to conceal his nature from himself or from the world."

Whose Conscience Is "Natural Law"?

In attempting to attribute absolutism in government to men of Justice Holmes' thinking, Mr. Palmer falls into a pit from which it is difficult for him to extricate himself. He speaks of Holmes' view that law is a sovereign's command, and then complains that from such a command there can be no appeal to principles of ethics or of moral law or of any kind of law of nature. But who is the Appellate Judge? If refuge is taken in the stock answer of the school of natural law that it is the conscience of man, we may ask: "the conscience of whom?" And there we stop.

But Mr. Palmer goes on deeper into the pit. Says he:

> And even if the absolutist majority really and conscientiously tries to use its power for the good of all, the question remains, what are the standards of the majority? How do they know what is good for all? And so we come full circle back to the initial question. How can you tell what is "good" for man unless you know what he is for? Or, putting it another way, will not your sincere and altruistic determination of what is "good" for the men you rule be inescapably determined by your opinion as to what their destiny is, what they are for?

Minorities and Popular Sovereignty

This catechism amounts to nothing but opposition to democracy and its working principle—majority rule. How can popular sovereignty tolerate minority rule, when there may be as many minorities as individual citizens? In fact, one may infer that he opposes lodging governmental power anywhere, because no one can trust his fellow to determine what "man is for." His words leave us with the natural law, the standards of which every conscience is free to interpret for itself. It may leave us without a temporal sovereign, and therefore anarchy. This is where natural law may lead us. In such a situation the ruthless and strong would surely dominate with a force more direct and with suffering more acute. Profound respect is due the dictates of conscience which have sustained the great religions of all time. But unless these dictates are translated into governmental recognition there is no protection, even for freedom of conscience itself. Our own Federal and State Constitutions demonstrate that.

Mr. Palmer forgets that if the majority does not convert their ideas of right and wrong into legal standards of conduct, some kingly person will eventually implement his own ideas by force, and the people will then end up with usurpation of power by an absolutist Hitler after all. The truth is: Reliance upon natural law can lead to such a result.

Mr. Justice Holmes escaped all such pitfalls and drew the practical conclusion that all law is but rules of conduct emanating from sovereign power, and effectuated in the ultimate by force. This is certainly a philosophy under which a democracy can successfully operate. Will the people make it work?

In Conclusion

What is the moral in all this? It is that the people are responsible for the laws they have which regulate their conduct. The substance of what they get is not and cannot be found in nor determined by some immutable, abstract pronouncements in a constitution or otherwise. Any preservative of declared principles, of liberties, must rest in the political thought and action of the people. It is well to extoll a government of laws. But that is all mixed up with administration and application of laws by men.

In the last analysis men make the laws directly or indirectly, and choose the magistrates who reflect their desires in the long run. In a final sense we have a government of men. It is dangerous, as Holmes clearly saw, for men to rest upon the fallacy that they are governed and secured by natural law. Men should take full responsibility for the law, and not place it upon a superhuman giver of eternal rules of conduct.

General Assembly to Meet October 23

The United Nations have accepted reluctantly the postponement, from September 23 to October 23, of the first American meeting of the General Assembly. The continuance of the Conference of Paris compelled the further delay. The hearty welcome which was expressed in our September issue (page 568) to the Delegates and staffs of all Nations, and especially to the many lawyers among them, is renewed.

The hopes and prayers of Americans continue to be that the Assembly can remove the road-blocks to organized international cooperation and thereby achieve great and abiding results for peace and law.

Reply to Mr. Charles W. Briggs

by Ben W. Palmer

OF THE MINNEAPOLIS BAR

Mr. Brigg's article will be of service in the cause of truth, of constitutional liberty and of a peaceful world order. For it serves to bring sharply into focus the recurrence, in this present world-revolutionary era, of the age-long struggle between concepts of law as reason and as force. Upon the outcome of this struggle depend civil concord, the perpetuation of constitutional liberties and civilization itself.

Mr. Brigg's contribution serves also to demonstrate the removal of constitutional limitations upon arbitrary power and in the long run the destruction of democracy itself that will result, if the American people and the final interpreters of their Constitution, the peoples of the world and their statesmen and jurists, accept his philosophy of law as force and deny the existence or validity of anything but the positive law of the sovereign state and the command of the "dominant majority".

Let us take his argument point by point:

First he says that "law is a sovereign's command and nothing else" and that "force is the *ultima ratio*." This is the traditional Hobbes-Austin-Holmes assertion that the only true or real law is the positive law of the sovereign state and that therefore there is no natural law.

Definitions of Basic Terms

At the risk of elucidating the obvious, let us define our terms. Law consists of rules of action. These may be descriptive statements of principles operative in various fields of phenomena arrived at by the inductive processes of science such as the laws of chemistry, of physics and of biology. These describe what *is*. But the rules as applied to human beings endowed with free will may prescribe what *ought* to be. The "ought" may come from God, if you believe in God, from conscience as the reasoned judgment of the mind, if you believe in conscience. It may come from within as a result of the individual's conception of his purpose and that of life and of the universe and therefore of the essential nature of man, society and the starry spheres. The "ought" may come from without the man, imposed on him by either the opinion or the force of others: By family, trade or professional groups, any of the proliferating associations so characteristic of American life, or by party, church or state.

As to natural law we may well begin with the beginning of the Egyptian calendar six thousand years ago, based upon the annual Nileflow and the rising of the stars against the pyramids. These served to give to men the concept of an ordered universe. Indeed what man could see recurring proud-pied April, teeming Autumn, old December's bareness, "the well-ballanc't world on hinges hung," the stars preserved from wrong, the "vulgar constellations thick that from the sun keep distance due"; what man could feel his own "pulse's magnificent come and go" without a concept of order and therefore of law?

He might be a psalmist in ancient Palestine singing of One "in Whose hand are the deep places of the earth; Who stretchest out the heavens like a curtain; Who laid the foundations of the earth." He might be a modern scientist, skeptical or scornful of the psalmist's anthropomorphic God, but aware also of an ordered universe of law from within the atom to inter-stellar space. Materialist, relativist, pragmatist concentrating on means rather than on ultimates or ends might view the universe as an uncomprehensible chaos of unrelated phenomena with which man should make his day-to-day adjustments. But these other men saw human nature not in isolation, but surrounded by and in relation to the order of created things, of other men, singly and in their infinite variety of groups: Familial, social, political and therefore legal.

Natural Law and an Ordered Universe

Natural law is the participation in the eternal law of an ordered universe by man as a rational creature. Participation in that order demands that man's conduct should be in

Editor's Note: For Mr. Palmers' articles which brought on this notable debate on great issues, see "Hobbes, Holmes and Hitler" (31 A.B.A.J. 569), "Defense Against Leviathan" (32 A.B.A.J. 328). With them should be read also Herbert L. Nossaman's communication and Mr. Palmer's brief reply to it in "Letters to the Editor" in our September issue (32 A.B.A.J. 615).

harmony with his nature as part of that order, in furtherance of his "being". Hence he should not destroy life, the liberty which makes life possible, valuable, enriching to self and others, capable of progress. He should not destroy private property since it is an extension of the personality of the owner and an indispensible condition to freedom. He should not destroy the family since it is the basis of society, of the state and of the perpetuation of the race. And what he should not do as an individual he should not do as a king or fuehrer, nor in association with others in a "dominant majority" say of 140,000,000 to 1. Since he is a social being by nature and given the gift of speech he should tell the truth; he should keep his word. And so in international relations the state which he controls should act in the same way that he should act himself: It should respect the life, the liberty, the property of other nations; it should tell the truth; it should keep its word.

Does Natural Law Lack "Certainty"?

Mr. Briggs says there is no "natural law" because it lacks certainty. Let him define his "certainty" and look to the lady of his allegiance: The positive law. Is there no law of polite society because everybody does not agree with Emily Post? Is there no moral law because everybody does not agree upon the indissolubility of marriage? Is there no positive law because we spend laborious days and sleepless nights in piling Pelions of digests upon Ossas of statutes, encyclopedias, and selected conflicting cases?

Mr. Briggs says there is no natural law because it lacks "stability"; its meaning changes. So does the child become the man, but the essence remains the same. The principles of the Decalogue are elaborated in their application to specific cases and changed conditions, in the development of canon law and Christian ethics. "Thou shalt not steal" is applied to the lawyer in his air-conditioned office or the "blue sky" salesman of today, as to one who stole an ox in ancient Palestine.

The positive law itself may serve to warn the uninstructed man of violation of natural law too detailed or logically remote from basic principle to be apprehended by him without reflection or logical, technical training. And much of the positive law has no connection with natural law. From the standpoint of that law as from that of the moral law, it is often a matter of indifference, of compromise, of judgment as to efficiency, enforceability or expediency: Whether the law shall apply to employers of eight or of six, whether grand larceny should begin at $50 or $100; on which side of the road we should drive our cars.

So, too, as to natural law, there may be agreement upon the principle, the ultimate destination—disagreement about the best road to take.

These disagreements do not destroy the principles though they may cause debate. And the charge that certainty is fatally lacking to natural law because in the long history of the race some men have misunderstood its basis and its nature and others have used it to cloak their own evil purposes in contradiction to that law, falls of its own weight when baldly stated. As to the perverters of the truth, we need only apply to natural law Madame Roland's "O Liberty, what crimes are committed in thy name!" The crimes do not annul the natural law. That men sophisticate the truth to their own bad purposes does not destroy the truth.

Is Natural Law "Abstract" and "Academic"?

Mr. Briggs says there is no natural law because it is "entirely abstract", "speculative and academic", and "history affords no evidence of permanent means of enforcement of those rights." Let him ask Charles I on the scaffold, George III and his associates, Louis XVI in his tumbril, Hitler cringing in his hideout. Let him ask Bethmann-Hollweg of the "scrap of paper" and the Germans who raped neutral Belgium and brought on their heads the wrath of the Western World. Let him ask those other Germans against whom the moral indignation of the civilized world still burns because of the millions they made die and because of their unspeakable violations, not of positive law but of natural law: The myriad tortured and exterminated "non-Aryans", the churchmen of every faith—Dachau—Lidice. Is there no sanction here?

If perchance you answer that some may go unpunished, I reply that so do many murderers and thieves; but that does not destroy the positive law. And finally, as to sanction, let any prospective totalitarian tyrant, individual or many-headed Cerberus, scan the pages of history and see how again and again the concept of natural right has beheaded Caesars. It is their eternal foe; an ever-present help in time of trouble to liberty-loving men; a sword perhaps momentarily forgotten when the peril is not plain, perhaps sometimes somewhat rusted in the scabbard. But, once drawn, let them beware.

Is There a Lack of "Harmony and Consistency"?

Mr. Briggs says there is no natural law because "it lacks harmony and consistency". But these are relative terms, and so might equally well be applied to his positive law. They are based, in part if not entirely, upon different interpretations, applications, understandings and misunderstandings of natural law and upon viewing as existent at one and the same time all of the foregoing of which we have a record.

Boldly my honorable opponent puts forth the hangman as demonstrator of the inconclusiveness of the hanged man's reasoning. But we ask: "Since when has might become right or is there any connection between physical force and reason, between the Brownshirts' bloody truncheons or Japanese bayonets in the death-march on Bataan and truth?" Call the long roll of martyrs

for truth or reason: Servetus, St. Thomas More, Edith Cavell, Pastor Niemoeller. Let them give the answer from the crimson sands of the Colosseum, from faggot, rack and block.

Should Natural Law Be Denied Existence Because It Is Not "Codified"?

My honorable opponent denies the existence of natural law because "it has never been codified" and furnishes "only a statement of postulates in the most general terms". Does he say that the common law is not "law" because it has not been entirely codified? And do not Magna Carta and the English Bill of Rights and other basic documents of English constitutional law contain codified principles of natural law?

Certainly our Constitutions, State and Federal, have been uniformly regarded as expressing such principles, some of them under the specific heading: "The supreme *law* of the land". It will not do to say that by expression in such Constitutions they are raised to the dignity of "law" by becoming part of the positive law. That were to deny the whole theory of pre-existent rights upon which those Constitutions were avowedly predicated. And as to "postulates in general terms", what of the calculated generalties of the Constitution itself, admittedly positive law though preceded by the natural? Are the "due process" clauses to be erased from the positive law of the Constitution because we may find as difficult as jesting Pilate's "truth" the answers to the questions: What is "life"? What is "liberty"? What is "property"? When is process, procedurally or in substantive law, "due"? We must wrestle with these questions, but we cannot convincingly claim that the presence of "generalities" destroys the Constitution. And if they do not destroy that instrument, neither do they destroy natural law or prevent its coming into being.

Mr. Brigg's quarrel with natural law, like that of other champions of Austinian conceptions, is, I think, based upon an assumed *necessary* incompatibility between the two forms of law.

Incompatibility Between Natural and Positive Law?

The positivists, frequently unaware of the totalitarian consequences of their philosophy, have claimed the exclusive use of the word "law" for their own particular favorite. They have denied the reality or relevancy of other so-called law. Certainly the lawyer knows the professional use of the word.

Of course, no lawyer challenges the compulsive force of a plain legislative mandate on the ground of natural law. But what lawyer, whether thinking of natural law or not, has failed to appeal to a jury on what in effect are its principles? Surely he has appealed to that law, though perhaps not *eo nomine*, in contending for his particular construction or application of constitution or of statute or for the choice of one of competing analogies.

If substantive law is secreted in the interstices of procedure, the quality of that secretion is inevitably determined to large extent by appeals for specific justice based on the concepts of natural law. If this be not so, then has the profession of which we are so justly proud become a mockery and a by-word; we are not ministers in any of justice's temples; our labors are largely vain; and we have become a reproach to the people we profess to serve. Then should we remove the lady with the scales from atop our courthouses and unchisel from the frieze of the Supreme Court building in Washington the words: "Equal Justice Under Law".

Natural Law as Critic of the Positive

Natural law, rightly conceived, is a constant critic of the positive law, not necessarily its enemy. It may serve as the best friend and chief supporter of that law, though its candid criticisms may irk those who would subvert it to purposes contrary to natural law. Indeed, the great mistake of the positivist is that all he can see in law is force as sanction. He is blind to the fact that millions of men go through life without seriously disobeying the law, without lawsuits or prosecutions, because they respect the law. They obey because they do not regard it as their enemy. Generally they do not obey because of fear, otherwise a gestapo were needed in every block. They believe that it represents or is intended to represent rules or principles not inconsistent with the natural law; that the state is a natural society because based upon order and man's social nature. They obey as the child carries out the wishes of a rational father though he may disobey an arbitrary one.

True, some men abide by the positive law because on reflection they regard majority rule as the only alternative to chaos, because they do not have much at stake or perhaps because they have come to deify democracy. But if there is anything plain in history it is that the positive law may go too far, whoever be its maker. The cry for justice based on natural law coming from the heart of man can not be silenced whether it be the Man with a Hoe, the seamstress in her garret with her "seam and gusset and band", the workman at lathe or furnace, or even perchance some millionaire in his penthouse. As to the workman, theoretically materialistic economic determinist as Marx and Engels were, the great driving force of Das Kapital and the Communist Manifesto was their indignation at what they regarded as intolerable injustice. The submerged tenth will not stay submerged but will thrust its fist through the tesselated floor of the nine-tenth's ballroom overhead. The safeguard therefore to positive law, the insurance for democracy that it will endure, lies in respect for its fearless friendly critic, natural law.

Concerning Mr. Justice Holmes

My honorable opponent protests my pigeon-holing or labeling of Holmes. But without categories, without ge-

nus and species, definition, the discovery and transit of truth, thought itself, are impossible. And in the warfare of ideas, in that struggle for truth in the market place upon which Holmes placed such emphasis, the battle lines of controversy must be clearly drawn. For otherwise we look down as if upon a melee of undistinguishable condottiere in a market place of fourteenth century Florence or a milling mob of shirt-sleeved picketers and strike breakers in a modern industrial city. As in war where there is reason for shooting the soldier in civilian clothes or in enemy garb, we must have some means of telling on which side men do battle.

True, indiscriminate namecalling may serve no purpose. True, that a man, particularly of the type of Holmes has unique qualities of personality not covered by any uniform he wears. But always we cry: "Under what king, Bezonian?" We demand the uniform that serves to tell us under what banner he fights and for what cause. Thus we may hasten to his side if he be friend, but smite him if a foe.

The Need for Classifying and Labelling Men

So it is that to label a man pragmatist, materialist, or utilitarian, of course does not prove the unsoundness of his views. But if the label be as approximately accurate as the nature of labels permits—and Mr. Briggs does not deny the accuracy—such a marking may perhaps lead men captivated by another's charm to ask for the charmer's credentials, to inquire more closely on what side he fights, and most of all, whether the road upon which he sets their feet will, perhaps without his vision of its end, take them and society to the place of their hearts' desire or to catastrophe.

If any watcher on our walls has detected the enemy within our gates, let him bid the trumpeter blast awake the sleeping and the indifferent. And if our enemies have scaled the walls, fifth-columned our city and are among our tents, we must ask each man to give the countersign and show his uniform, lest the citadel fall—and most of all a leader with the following of Mr. Justice Holmes.

As to the Declaration of Independence

As to the Declaration of Independence, my honorable opponent joins the attack made in recent years upon that cornerstone of the Constitution by the evident implication others have made that Jefferson and his associates were so stupid as to believe that all men are created equal in body or mind, in natural endowments or capacities. But he overlooks the fact that the popular sovereignty, the democracy, the majority rule which he so greatly prizes, had their historical origin largely in that desire for equality that is sister of liberty: Equality of opportunity, equality in society, but above all, that equality before the law which, however imperfectly realized at times, is still particularly the proud boast of Anglo-American law and of American lawyers.

And perhaps in quoting Lincoln he overlooked the fact that in his debate with Douglas at Peoria on October 16, 1854, Lincoln said he believed in the principle that each man should do as he pleased with what was exclusively his own because it was "naturally just"; that his "ancient faith" taught him that "all men are created equal." So at Independence Hall on Washington's birthday 1861 he said: "I never had a feeling politically that did not spring from that Declaration which gave hope to all the world for all future time . . . promise that in due time the weights would be lifted from the shoulders of all men, and that all should have an equal chance."

Lincoln's Inspiration from the Declaration

But, said Lincoln in the same debate: "Little by little, but steadily as man's march to the grave, we have been giving up the old faith for the new faith. Nearly eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration that for some men to enslave others is a sacred right of self-government. These principles cannot stand together. They are as opposite as God and Mammon; and whoever holds the one must despise the other. When Pettit, in connection with his support of the Nebraska bill called the Declaration of Independence 'a self-evident lie', no one rebuked him. . . . If this had been said in Old Independence Hall seventy-eight years ago, the very doorkeeper would have throttled the man and thrust him into the street."

Limits of Legislative Experimentation on Others

Have we "run down" to such an "other declaration"? Are there to be no limits to the positivist concession of "the privilege of men to indulge in legislative experimentation to regulate their lot?" The guinea pigs protest. "Holmes believed," says Mr. Briggs, "that man, speaking collectively, made his own law." But this is begging the question and succumbing to a fallacy that even Rousseau with his glorification of the General Will sought to avoid, though vainly.

For this is to personify all men as one, which is too far from reality for even an "idealist" to swallow. And in the very next sentence the falsity of the personification is revealed in the statement that "law in a democracy is necessarily the command of the dominant majority of the social group." So it comes out that it is not simply the experimentation of man on himself. He is to experiment on others. And if there be nothing but positive law, what is to stop the "dominant majority"?

Democracy and Liberty

And here we would not be misunderstood and so perhaps berated. One may have a profound faith in democracy as the best devised expedient for solving perennial problems of liberty and authority and as most

(Continued on page 716)

Section Submits Resolutions for "World Government"

The Section of International and Comparative Law, through a Section Committee headed by Judge Frederic M. Miller, State Delegate from Iowa, has submitted in the Advance Program pamphlet to the membership of the Association, Resolutions in favor of "limited world government," which will be debated and voted on at a meeting of the Section, and if approved by it will be submitted for action by the Assembly and the House of Delegates, at the Annual Meeting of the Association at Atlantic City during the week of October 28.

An important question of policy, for the Association and for the United States, is thereby presented. All members of the Association should form their opinions on the subject and make them known to their members of the House of Delegates, (for list see 32 A.B.A.J. 597), in advance of the Annual Meeting.

As contributions to an informed discussion, this issue publishes the Resolutions and Report of the Section's Committee in full, and also an article by Frank E. Holman of the State of Washington, for some years a member of the House of Delegates, on: "World Government No Answer to America's Desire for Peace and Law". Both should be read without putting aside, by every member of the Association.

Text of the Section's Resolutions

The Resolutions drafted by the Section's Committee headed by Judge Miller are as follows:

Whereas, the devastations and untold sorrow produced by two World Wars have demonstrated that peace cannot be maintained through preparations by individual nations for defense against war and that enduring peace can be attained only through the establishment of justice administered according to law on a basis that will eliminate resort to war for the settlement of international disputes; and

Whereas, the Constitution of the United States, under which the union of independent States has been effectually preserved for 157 years, affords a pattern for a federation of the nations resting upon limited delegated powers so as to attain the essential minimum of centralized control in international affairs with the maximum of self-government in national affairs; and

Whereas, only by widespread education can public opinion be formed to support an effective world government designed to insure justice through laws;

Be It Resolved that the American Bar Association affirms its belief in the following principles:

1. World peace must rest upon the solid foundation of justice administered according to law.

2. The present Charter of the United Nations can and should be utilized, through proper revision thereof or amendments thereto, to provide a world government under law, consisting of judicial, legislative and executive branches, with necessary checks and balances analogous to those provided by the Constitution of the United States; the legislative powers should be limited, specific and clearly defined, without authority to intervene or act in any matter which is essentially within the domestic jurisdiction of any nation, the laws to be applicable to and enforced against individuals as well as nations and to provide regulation and control of atomic energy and other means of aggressive war; the legislative body might well be organized on a bicameral basis, with weighted representation in one chamber and equal representation in the other; each nation should be free to determine for itself the method of selecting its members of the legislative body, in order that they may carry out the will of the people they represent, the issues to be decided by the votes of the individual members rather than by nations; the judiciary should be given the power to interpret the Charter as well as to construe legislation and to determine whether any organ of the United Nations has exceeded the powers granted it by the Charter.

Be It Further Resolved, that a copy of this resolution be sent to the President and each member of the Senate and House of Representatives of the United States, and to each of the delegates of the United Nations Organization from all of the nation members of said organization.

The Resolution by Fyke Farmer

The Resolutions recommended by the Sections are a substitute for those offered by Fyke Farmer, of the Nashville, Tennessee, Bar, a leading proponent of "world federation now", in the Assembly at the 1945 Annual Meeting of the Association in Cincinnati last December. Mr. Farmer's resolution was at that time, by a vote of the Assembly and the House of Delegates, on the recommendation of the Resolutions Committee, referred to the Section of International and Comparative Law, for study and report at the 1946 Annual Meeting. As originally offered by Mr. Farmer, the Resolutions were as follows:

Whereas, the war system as a means of suppressing international disorder must be replaced by the institutions of government capable of abolishing war through *law;* and

Whereas, the Constitution of the United States under which the union of independent States has been effectually preserved for 157 years affords a pattern for a system of World Federal Government resting upon limited delegated powers so as to attain the essential minimum of centralized control in international affairs with the maximum of self-government in national affairs; and

Whereas, only by widespread education can public opinion be formed to support the next step in world or-

ganization which must be the establishment of a government under a Federal World Constitution designed to insure justice through laws, which are made applicable to and enforced against individuals and in which the government thus established can be controlled directly by the individual citizens of the member nations voting according to a balanced system of representation;

Be It Resolved, that the American Bar Association hereby endorses and approves the principles above set forth, and advocates their development through the framework of the Charter of the United Nations Organization, our endorsement and support of which we wholeheartedly reaffirm.

Be It Further Resolved, that a copy of this resolution be sent to the President and each member of the Senate and the House of Representatives of the United States, and to each of the delegates of the United Nations Organization from all of the nation members of said organization.

The Report by the Resolutions Committee

The report which the Resolutions Committee, under the Chairmanship of James R. Morford, of Delaware, made to the 1945 Assembly and was adopted by it, and by the House of Delegates, was as follows:

> The Resolutions Committee reports the attached Resolution to the Assembly of the American Bar Association with the following recommendation:
>
> That said Resolution be referred by the Assembly to the Section of International and Comparative Law for approval, rejection or modification, with instructions to the Section to report the same and the action of the Section thereon to the House of Delegates and to the Assembly at the next annual meeting of the Association.
>
> The foregoing action of the Resolutions Committee was authorized by a vote of eleven members for and two against the above recommendation.

The recommendations of the Resolutions Committee were not opposed by Mr. Farmer.

Substitute Resolutions Are Approved by Mr. Farmer

Concerning the "very serious consideration" which it gave to Mr. Farmer's Resolution, the report of the Section Committee states:

> The members of the Committee expressed themselves as being in accord with what appeared to them to be the general purposes of the Resolution but were agreed that modifications thereof were necessary to clarify it and to avoid the possibility of misunderstanding. The Chairman of this Committee had several conferences with Mr. Farmer, one of them consuming a full day's time. The final draft of the Resolution, as modified and revised by this Committee, was submitted to Mr. Farmer and was approved by him.

As to the preparation and status of the Section Committee's Report, as signed and submitted by him, Chairman Frederic M. Miller stated in a foot-note to the report:

> The foregoing Resolution and Report have been prepared by the Chairman after consultation with Mr. Fyke Farmer. The action of the Committee in regard thereto has been by correspondence. As it was not possible for the Committee to hold a meeting to discuss and decide upon the specific language of the resolution and the report, the foregoing is submitted as substantially agreed upon by the majority of the members of the Committee and will form the basis for further discussion by the Committee at Atlantic City before being submitted to the Section for its action at that time.

Previous Actions Voted by The House of Delegates

On September 12, 1944, on the recommendation of its Special Committee, created by a vote of the House on February 29, 1944, to report as to Proposals for the Organization of the Nations for Peace and Law, the House of Delegates voted in favor of "the continued consultation, association, agreement and cooperation of The United Nations", (30 A.B.A.J. 659), and voted further, a month before the making public of the Dumbarton Oaks Proposals, that the Association,

> "while opposing as unnecessary and unwise the creation of any manner of super-government or super-state, reiterates its earnest support of the earliest practicable establishment of a general international security organization, based on the principles declared in these Resolutions".

The House further declared its considered opinion to be that

> "It is an exercise of sovereignty for a Nation to join with other Nations in setting up an international security organization";

and favored

> "the membership and responsible participation of the United States in such a general international organization".

On April 4-5, 1945, in the absence of a meeting of the House of Delegates, the Board of Governors, again on the recommendation of the Special Committee, adopted Resolutions to similar effect (31 A.B.A.J. 226) based on the Dumbarton Oaks Proposals with specified strengthening changes.

On December 18, 1945, the House voted strongly in favor of "united American support for The United Nations" (32 A.B.A.J. 13) along with "active consideration" of amendments to "improve" the Charter; and declared that "The first objective should be to help make The United Nations Organization to work as effectively as it can." The foregoing actions were taken by the House although a minority of three members in the Special Committee dissented from the Report on the ground that they favored a declaration for a "world federation".

On July 2 of this year, the House again voted, on the unanimous recommendation of the Special Committee, in favor of "united American support for The United Nations" and for the consideration of specified amendments of the Charter. (32 A.B.A.J. 465).

The Resolutions under consideration for submission by the Section will be recognized as differing from, and going beyond, the actions heretofore voted by the House of Delegates.

Text of the Report for "World Government"

The Report by the Section Committee in support of its Resolutions is as follows:

> Surely, there can be no question but that an enduring peace must be based upon justice administered according to law. We feel that we need do no more than quote the very concrete statement of Judge Manley O. Hudson in an article appearing in the September, 1945, issue of the AMERICAN BAR ASSOCIATION JOURNAL, at page 443, wherein he stated:
>
> What is our goal? Above all, peace. Not a peace imposed by

might, but a peace which rests upon the solid foundation of justice. And to lawyers at any rate that peace is possible only if justice can be administered according to law. An organized world cannot exist without organized justice.

The achievement of international justice, administered according to law, requires what Judge Robert N. Wilkin terms a juridical order in his *Three Pillars of Peace*, distributed by the Council of World Affairs, to-wit:

> Juridical Order is the political arrangement by which the positive law is declared, amended, interpreted and enforced. Many people think that the phrase applies merely to courts and their work, but that is erroneous. The judiciary is only one of the departments of government provided for by juridical order. It also calls for legislative and executive departments. A synonym for the word *juridical* is lawful. The phrase comprehends the implementation of law for all purposes of government. Since Juridical Order embraces three departments, legislative, executive and judicial, it is necessary to bear in mind the essential functions of each.

Present Charter Should Lead to World Government

The present Charter of the United Nations can and should be utilized, through proper revision thereof or amendments thereto, to provide the legislative, executive and judicial branches of an effective system of world government to provide international justice, administered according to law. The Charter provides for six principal organs: the General Assembly; the Security Council; the Economic and Social Council; the Trusteeship Council; the International Court of Justice; the Secretariat.

In utilizing these organs, the International Court of Justice can and should be the corner stone for the judiciary, the General Assembly for the legislative branch and the other organs for the executive branch, with the Economic and Social Council acting also in an advisory capacity to the legislative branch. Articles 108 and 109 of the Charter specifically authorize a General Conference of the Members of the United Nations to review the present Charter and take any necessary steps to revise and amend it.

The fact that every reference in the Charter itself is uniformly to "the present Charter" demonstrates that the Delegates at San Francisco contemplated that such a General Conference would be called at some future date and that amendments or revisions of the present Charter would result therefrom.

Present Frame-work for World Government

The present Charter now provides the framework for a world government and actually has created a world government. The International Court of Justice is specifically referred to in Article 92 as "the principal judicial organ of the United Nations." The United Nations Organization has a judicial branch. The House of Delegates of the American Bar Association has specifically stated in the resolutions adopted by it on July 2, 1946, and on December 18, 1945, on the recommendation of Judge Ransom's Special Committee, that the powers and jurisdiction of the Court should be strengthened. That is implicit in the Resolution proposed by this Committee. The organs of the United Nations, other than the Court and the General Assembly, constitute the executive branch. The Resolutions of the House of Delegates aforesaid proposed changes in the exercise of executive powers.

These and other necessary changes are implicit in the Resolution of this Committee. The principal defect in the organization of the United Nations under the present Charter is the absence of delegated legislative powers to an organ thereof. At the present time international legislation can be effected only by the negotiation of treaties and conventions. The legislative branch is not absent, but it is not as effective as it should be.

A World Legislature Is Needed

In the Resolutions of the House of Delegates, adopted as aforesaid on July 2, 1946, and December 18, 1945, it was also proposed that specific, clearly defined and limited legislative powers be granted to the General Assembly. This would provide an effective legislative branch for the United Nations.

Accordingly the Resolution now proposed by this Committee is definitely consistent with action heretofore taken on behalf of the American Bar Association and is intended, primarily, to bring into clearer focus the position already assumed by the American Bar Association in respect to the international organization of the Nations of the world.

The legislative powers specified by the Resolution of this Committee are substantially those specified by the aforesaid resolutions of the House of Delegates.

Weighted Representation and Individual Voting

Article 9 of the present Charter provides that the General Assembly shall consist of all of the Members of the United Nations and Article 18 provides that each member of the General Assembly shall have one vote. Delegation of legislative power to the General Assembly is not feasible without provision for weighted representation therein.

In the Resolutions, adopted by the House of Delegates as aforesaid on July 2, 1946, and December 18, 1945, it was proposed that the present Charter be amended to introduce the principle of weighted representation in the General Assembly. While some advocates suggested that this would be a relatively simple proposition, this Committee feels that it would be very complicated when applied to a world legislative body. In the Constitution of the United States, the problem was solved by creating a bicameral Congress with weighted representation in one body and equal representation in the other. The Resolution proposed by this Committee suggests that such a solution be considered for the United Nations.

The introduction of weighted representation into the legislative body necessarily implies that the voting therein be by individual members rather than by nations.

World Government The Hope for Peace

Obviously, the powers delegated to any organ of the international organization should be specific, limited and clearly defined. The present Charter is so drawn. To give effect to such limitations the judiciary should have the power to construe the Charter as well as the legislation and to determine whether any organ has exceeded the powers granted it by the Charter.

The Resolution proposed by this Committee does no more than set forth broad general principles on which to make the present Charter of the United Nations effective so that future international disputes may be determined by justice administered according to law, rather than through resort to the unthinkable devastation of war in an atomic age.

This presents the only real hope for an enduring peace, for the salvation of civilization as we know it. Essentially, all of said principles have been heretofore affirmed by Resolutions of the House of Delegates. The Resolution of this Committee, however, does bring the positions heretofore taken into clearer focus. By so doing it renders a real service.

"World Government" No Answer to America's Desire for Peace

by Frank E. Holman

OF THE WASHINGTON STATE BAR

This article is intended to provoke discussion and consideration of the position and program of the "world government now" advocates. Is the formation of a "world government" or super-state an answer to the desire of America and the world for peace, justice and law?

The American Bar Association, through the House of Delegates, declared on September 12, 1944, "that the American Bar Association, while opposing as unnecessary and unwise the creation of any manner of super-government or super-state, reiterates its earnest support of the earliest practicable establishment of a general international security organization, based on the principles declared in these Resolutions" (30 A.B.A.J. 545). The basic principle, as I understand it, was organized *Cooperation* of the Nations. The House of Delegates has not withdrawn or changed its declaration against a "super-government or super-state".

On December 18, 1945, the House of Delegates declared "that the American Bar Association is of the opinion that the interests of world peace and the rule of law will be best served by united American support for the United Nations Organization and its full functioning at the earliest possible time, along with active consideration of such improvements in the Charter as are shown to be needed because of the many momentous events since the adjournment of the San Francisco Conference. The first objective should be to help make the United Nations Organization work as effectively as it can" (32 A.B.A.J. 203). This action was voted although a minority of the Association's Committee dissented because they urged a "world federation".

As recently as July 2, the House of Delegates voted, with substantial unanimity, "that the American Bar Association is of the opinion that the course of events has given added importance and urgency to its previous recommendation for united and active American support for the United Nations as the available means by which adequate organization for peace, justice and law can best be sought, through the further growth of international understanding and cooperation among Nations and the development of an accord as to such amendments of the Charter as experience shows to be needed" (32 A.B.A.J. 468). The Chairman of the House ruled out of order (32 A.B.A.J. 485) a motion which would have interpreted this declaration to be "without prejudice" to a resolution for "world government now", to be acted on by the House at the Annual Meeting in October.

Because a proposal to favor a "super-government or super-state" and to lend the Association's prestige and support to the "world government" propaganda will be placed before the House of Delegates for debate and action this month, I suggest that all members of the Association should think about it, make up their minds about it, and let their members of the House of Delegates know how they feel about it. This article is meant as my contribution to the discussion of the merits of this great issue.

Reality Is Needed in Our Thinking About Peace

When war is being waged, and for the immediate years following when its sacrifices and dislocations are felt in every home and at every fireside, the peace-loving peoples of the world naturally consider and earnestly explore the possibilities of finding a formula for the elimination of war. During the war and up to the time of the San Francisco Conference, there were more than one hundred public or semi-public agencies or groups in the United States engaged actively in sponsoring one formula or another for the prevention of war and the substitution of the rule of law. If war is a grim reality, the attainment of anything like an enduring peace with justice requires reality in our thinking, the avoidance of false assumptions regarding the causes of war, and particularly a careful scrutiny of short-cut analogies and slogans.

Americans Prone to Seek Easy Formulae

One of the realities in considering the problem of peace is to recognize that Americans often approach international problems by assumptions, analogies and slogans which

Editor's Note: Frank E. Holman is a member of the House of Delegates, and was recently the President of the Washington State Bar Association. He has been, from its creation in 1944, a member of the American Bar Association's Committee on Proposals for the Organization of the Nations for Peace and Law. The Committee has not made a recommendation to the House of Delegates, in 1945 or 1946, as to the proposals for "world government now".

do not fit the facts of international reality and experience. In countries which were more directly affected by the grim reality of battle, there is usually less theorizing and less tendency to deal with the problem by easy formulae. In the United States, many persons, including many lawyers, are now proposing to solve the problem of peace by the slogan "One World or None" and by drawing an analogy between the organization of the original American Colonies into a Federal republic and the organization of the Nations of the world into a Federal state.

Americans generally—neither by education nor by travel—know very much about the rest of the world. They are as a whole unfamiliar with the National backgrounds and characteristics and rivalries which exist in other parts of the world. Hence they are easily persuaded to answer grave international problems by relying upon slogans and analogies. We claim to be a very practical people, and in our domestic business affairs this is more or less a correct characterization; but our approach to international problems is often based upon fallacies and propaganda as to the causes of war and as to the realities of preserving the peace and establishing justice, fair play and security among the Nations large and small.

Americans Accepted False Assertions

For example: The current view of many Americans is that World War I was caused because Germany lacked access to world markets, lacked *lebensraum* for her people, and hence that her legitimate expansion was artificially restricted to a point where it was necessary that she break the barriers of her encirclement. The Kaiser and his apologists created the bogey of economic oppression to convince the Germans themselves, and world opinion at large, that a war whose underlying purpose was to achieve world domination was in fact only for the purpose of achieving for Germany a decent economic status in the family of Nations. If the facts are examined as to Germany's economic position in the world as it stood in 1914, it will be easily established that such slogans as—"Germany lacked *lebensraum*" and "Germany lacked access to world markets" were untrue.

As to *lebensraum*, the following per square mile population figures are significant (Statesmen's Year Book): Germany, 382 per square mile; Belgium, 670 per square mile; Holland, 686 per square mile; England and Wales, 686 per square mile.

Germany's Trade Expanded Greatly Before World War I

From the time of the defeat of France in 1870 and through to 1914, the Germans were free to organize their internal economy, and did organize their internal economy very effectively. During the same period and particularly during the period from 1900 to 1914, the Germans were not prevented, by England, France or any other country, from expanding their world trade and commerce. Their total world commerce by 1914 exceeded that of France and also that of the United States, and was increasing more rapidly than that of England.

German trade penetration in South America and the volume of export business conducted as a result thereof by 1914 exceeded that of France, and during the five-year period from 1909 to 1914, in Argentina, Brazil and Chile, increased proportionately more than that of England or that of the United States. German commerce with the United States in 1914 exceeded that of France and for the five years preceding 1914 increased proportionately more than England's trade with us. In spite of the fact that Germany had few political possessions of consequence in the Orient, German export trade with China during this period more than doubled and her export trade in the Dutch East Indies nearly tripled. Germany's export trade with British South Africa nearly doubled, and with Canada more than doubled, during this period. Germany's total foreign trade, during this five-year period immediately preceding World War I, increased ninety per cent, while that of England during the same period increased only sixty per cent and that of France only thirty-two per cent.

From the economic or business point of view, it was sheer falsehood—but a kind of falsehood which many Americans believed—to say that Germany's economic position in 1914 forced that country to start a war. The fallacy that both World Wars were caused by economic distress or inequalities has so permeated the American mind that many think world peace is attainable only by a leveling out of the world's economic inequalities and that the surest way to do this is to have a "world government" which can enforce a planned economy everywhere.

Germany's War Ambitions Not Due to Distress

But, on the basis of the world trade figures, if instead of instigating war in 1914 Germany had gone forward peacefully for another fifteen years with the active and efficient expansion of her world trade and her internal economy, she would have become the first Nation of the world in shipping, trade, commerce, banking and finance. But the Prussians of the Kaiser's coterie believed in destiny, power and glory. It was a state of mind with them, not a matter of economics. They had no abiding desire or will for peace—instead they yearned for *Weltmacht*, for world political power and domination. This is fully established by the Kaiser's own words when, in addressing his troops in 1914, he said:

> Remember that you are the chosen people! The spirit of the Lord has descended upon me because I am Emperor of the Germans! I am the instrument of the Most High. I am His sword, His representative. Woe and death to all those who resist my will! Woe and death to those who do not believe in my mission! Woe and death to the cowards! May all the enemies of the German people perish! God demands their destruction, God, who through my mouth,

commands you to execute His will.

When it came to World War II, we were told by many of our own leaders that the economic oppression of Germany caused by the Versailles Treaty accounted for and in some sense excused Germany's resort again to war, under Hitler. Again the American mind dealt in false assumptions. What were the facts? It is one thing to read the Versailles Treaty, many provisions of which were harsh, and another to examine to what extent these provisions were actually enforced.

America Over-generous and Foolish After World War I

First, our sympathies were unduly aroused immediately following World War I. We were told in 1919 that, due to the harsh provisions of the Treaty of Versailles, the Germans were hungry and suffering great distress, little children were without milk, and Germany was faced with a generation of anemic, undernourished people. The fact is that it was these anemic and undernourished children, babies in 1919 and 1920, who became the stalwarts of Hitler's finest fighting forces and withstood as well or better than other nationals the winters of Russia and the desert heat of North Africa.

Internationally we have been an over-generous people and hence a foolish people—foolish because we believe we can solve the world's political problems by a generosity of spirit and generosity of pocketbook. In our generosity of spirit we proceeded to believe, and did believe, that the provisions of the Versailles Treaty were too harsh and oppressive and ought not to be enforced and that if the Germans were relieved of the requirements of this treaty they would then pursue a peaceful course of internal rehabilitation and world cooperation.

America "Rehabilitated" Germany for World War II

So out of our generosity of pocketbook we developed the Dawes Plan and the Young Plan and other plans of economic and financial relief for Germany. We poured more money into Germany than Germany was paying France in reparations. We did this for Germany's economic rehabilitation, and ostensibly it was used for this purpose; but the economic rehabilitation took the form of building factories, roads, bridges, food warehouses, housing projects, ships—all of which were an integral part of preparation for total war and all of which the Germans used as basic instrumentalities of total war. As pointed out at the time by Frank Simonds and others, the American investors paid the German war indemnities.

There were, of course, economic distress and unemployment in Germany following World War I, but not as much economic distress or unemployment during 1931, 1932 and 1933 as there were in both Britain and the United States. In 1932 Germany's recovery was such that she stood at the head of the world's exporting countries, and by 1938 and 1939 there was neither unemployment nor economic distress in Germany. If World War II had come in the early thirties instead of the fall of 1939, there would have been a better case for the theory that the second World War was caused by Germany's economic and social distress resulting from the harsh provisions of the Versailles Treaty.

America Has Poured Out Billions Without Assuring Peace

Though our generosity of spirit and of pocketbook following World War I brought us nothing and achieved nothing toward the establishment of an enduring peace, we have been pursuing a similar program following World War II. The United States wanting nothing out of the war, as usual, received nothing except a chance to be a good brother to everybody and to have, through Lend-Lease, UNRRA and other agencies, the opportunity to advance moneys to succor the world. Our financial succor has been operating through direct loans, through loans through the New World Bank set up at the Bretton Woods Conference, through loans through the Export-Import Bank and through outright grants by UNRRA, Famine Relief and a variety of other agencies. The United States puts up the money but has little or no control.

For example: The two measures of control which the United States wanted at the Bretton Woods Conference were that the United States, because it was putting up most of the money for the World Bank, should have a representative share of the directors and the headquarters of the Bank in Washington. Neither of these ideas appealed to the European countries nor to the South American representatives, and were voted down.

In one form or another, we have expended billions abroad all in the interest of putting the world supposedly back on the road to peace, but we have received no commitment from any nation that when it is rehabilitated economically it will direct its energies toward peace, justice and law. Why haven't we used our great bargaining power financially to achieve world peace instead of merely theorizing about peace? We have not done this, because we were fooled by false assumptions and we are not realists.

International Organization Before Settlement of the Peace

In order to avoid the mistakes of the Versailles Treaty and the weaknesses of the League of Nations, it was determined that an international organization should be set up to preserve the peace, and to do this before the peace treaties were drafted. It was thought that this would avoid confusing and complicating the development of a world organization for peace and security with the motives and rivalries engendered by the War and the settlements to be enforced by the victors. So by and through the Dumbarton Oaks Conference, the thinking and attention of the world were directed to the

problems of maintaining peace and establishing an international organization to enforce it, even before the war was finished and long before any effort was made toward agreeing on the peace treaties.

At San Francisco, with the war still unfinished, accredited representatives of the Nations undertook the task of adopting a program and structure for world peace which all Nations could agree upon. After earnest deliberation, they produced the Charter of The United Nations. This Charter was acclaimed by all as the world's greatest, most hopeful and, at the same time, the most realistic, approach to the attainment of world peace and the ascendancy of justice under law.

Hopeful Adoption of the Charter

Under date of June 26, 1945, the Chairman of the United States delegation (Mr. Stettinius), in a letter to The President stated:

> Not only the peoples of the United Nations but the more than sixty million men and women enlisted still in the armed forces of those nations regarded the Conference (San Francisco), and had a right to regard it, as a meeting of their representatives engaged upon a labor of immediate importance and concern to them.

Speaking of the Charter itself, he said:

> It would be a charter which would combine with a declaration of united purpose to preserve the peace, a realistic and suitable machinery to give that purpose practical effect.

Naturally the Charter did not satisfy the views of all the various "peace groups" in the United States. Some thought the Charter went too far in the direction of involving the United States in foreign commitments and entanglements. Others thought it failed to go far enough. Generally, however, the Charter was received with acclaim, and most people felt that if it were given a chance, it would develop into an instrumentality for preventing aggressive wars. Among those who thought that the Charter did not go far enough in setting up a strong international authority were the "world government now" advocates, whose numbers and fervor were greatly increased by Mr. Emery Reves' best seller *The Anatomy of Peace*. In other words—although the Charter was the result of the careful and earnest deliberations of men and women of many Nations and was supported and acclaimed by our own representatives, and the new Organization had hardly gotten underway, an earnest author writes a vigorous book, and many Americans proceed to accept this instead of the Charter as their bible for peace.

An Agitation Based on a Slogan

Upon what do the "world government now" advocates base their position? Largely upon a slogan and an analogy. Within the orbit of the slogan and the analogy their arguments revolve. None of their arguments really progresses beyond that circle. Within the circle and having accepted the verity of the slogan and the analogy, their arguments appear, as in all such situations, to be logical and unanswerable. Hence many converts are gained, and the whole agitation becomes National in scope. It has eventuated into something of a Nationwide cult which some lawyers, judges and others have joined with evident enthusiasm. To prove this, one only has to read the issues of their publication: *World Government News*.

The slogan upon which the "world government now" advocates predicate their thinking is: "One World — or None". This combines Mr. Wilkie's slogan of "One World" with the spirit of fear engendered by contemplating the destructive power of the atomic bomb. In other words, the matter is put to us directly upon the proposition that unless we are willing to accept "world government now" and organize the world and the nations and peoples thereof into a political super-state, we must content ourselves with having the world destroyed and hence no world.

The analogy which completes the argument is that whereas the thirteen original colonies by forming a federation eliminated among themselves the chance of war and for 157 years have continued as a single government, it only becomes necessary for the Nations of the world to have this fact brought to their attention and they will organize a world federal government. It is implied that this would require an effort differing not in kind but only in degree from that involved in the federation of the thirteen original States of the American Union. These two persuasive instrumentalities of slogan and analogy are gaining converts without any real examination of the realities.

What are the realities? It would take volumes of historical and geographical data[1] to review the realities, but a few of the background facts may be referred to. First of all as to the analogy of the United States. The original thirteen colonies, while differing in some respects, at least had a common language for the discussion and transaction of public affairs. Some Dutch, German and French was spoken in certain localities, but they were more or less family languages. In business and in public affairs and in political discussions, there was a common language. The institutions in each colony, political and legal, the concepts of the people with respect to these institutions, all had the same background of English-American Law and political tradition.

Insuperable Obstacles to World Government by Force

Take out a map of the world, spread it on a desk and look it over. It will be apparent that the attempted analogy between the thirteen original American colonies being formed into a political entity as a republic on a part of one continent, and the

(Continued on page 718)

1. For historical refutation and documentation, see "Hope or Despair as to the UNO: The Analogies from American History", by Reginald Heber Smith (32 A.B.A.J. 63); also the statement by Mr. Smith and William L. Ransom (32 A.B.A.J. 270) and Walter P. Armstrong's review of Professor Ranney's monograph (32 A.B.A.J. 227).

"Informal" Dispositions Under The Administrative Procedure Act

by Ashley Sellers

OF THE TEXAS AND GEORGIA BARS

The writer of this article represented The Attorney General of the United States before the Committees on the Judiciary of the Senate and House of Representatives in connection with the bills which, with the approval of The President on June 11, became the Administrative Procedure Act.

Mr. Sellers has been successively a county attorney in Texas, a law teacher in Georgia, a Special Assistant to the Attorney General, Associate Solicitor of the Department of Agriculture, and Assistant War Food Administrator. Now in private practice and located in Washington, D. C., he is the author, among other things, of a series of studies of the regulatory functions of the Department of Agriculture and is one of the recognized leaders in the field of administrative law. The JOURNAL *regards itself as fortunate in securing this first of two articles by him on certain of the more technical aspects of the new Act.*

The new federal Administrative Procedure Act is a statute of many facets. In the September JOURNAL (32 A.B.A.J. 550) Congressman John W. Gwynne wrote of two fundamental distinctions to be grasped by anyone desiring to understand it. First was the difference between rule making and adjudication—that is, between the "legislative" and "judicial" functions of administrative agencies. The second was the difference between "formal" and "informal" procedures. This article expands on the matter of informal procedures.

Where administrative agencies are required by law to act after a hearing or upon opportunity therefor, the proceedings are usually called "formal". Where they dispose of cases without such hearings, as a matter of convenient expression the procedure has been called "informal". There are, however, some additional considerations. Two in particular deserve discussion. They are (1) consent dispositions and (2) dispositons where statutes do not provide for a hearing.

CONSENT DISPOSITIONS

There may be an informal (or non-hearing) disposition of a case in the field of administrative adjudication even though statutes require a hearing. Thus Section 5 (b) of the Administrative Procedure Act, which section is applicable only to certain cases of adjudication in which statutes already require a hearing, provides that

> The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 7 and 8[1].

Thereby, in the covered cases, parties are given a statutory right to an opportunity for an informal disposition of the case even though they may be entitled to a hearing. Of this provision the Report of the Senate Judiciary Committee states:

> The preliminary settlement-by-consent provision of this subsection is of the greatest importance. Such adjustments may go to the whole or any part of any case. (Report No. 752, 79th Congress, (page 17.)

Still another provision, Section 6 (a), would achieve the same result but, in view of the express provision of Section 5 (b), is important only so far as (1) it adds a statutory right to counsel (2) is applicable more broadly "in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function", (3) requires that agencies proceed to make such informal dispositions promptly, and (4) requires that "due regard shall be had for the convenience and necessity of the parties or their representatives." Section 6 (a) will, however, be seen to be important in connection with another type of informal dispositon discussed below.

Before leaving the subject of informal settlement procedures, it should be noted that their application to rule making—as distinguished from adjudication—presents a different problem. Section 4, which deals with rule making, provides in subsection (b) merely that

> Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of Sections 7 and 8 shall apply.

The omission of the statement of a right to prehearing settlement pro-

1. It is to be noted that the comma after the word "hearing" is a printer's error or insertion, as appears from the other legislative documents, but does not in any event alter the sense of the provision.

cedure is in part a recognition of the essential distinction between rule making and adjudication, and in part it is due to the different structure of Section 4 as compared with Section 5 (which is further discussed below). So far as this particular type of informal procedure has a proper place in rule making, therefore, the right thereto is supplied by Section 6 (a).

DISPOSITIONS WHERE STATUTES DO NOT PROVIDE A HEARING

While consent or pre-hearing dispositions ordinarily take place through what may be called informal procedure, the latter term is more properly applied in cases in which statutes do not require a hearing at all.[2] In those instances agencies must invent some mode of proceeding. They may even hold hearings, as in the typical case of many immigration proceedings, but such hearings are not "statutory hearings" and would not be subject to Sections 5, 7, or 8 of the Administrative Procedure Act. Another example is the "conference" procedure of the Bureau of Internal Revenue in tax matters.

Informal Rule Making

The Act makes the situation fairly clear in Section 4 with respect to rule making because the principal portion of that section relates to cases where statutes do not provide that the agency shall act upon a hearing. (Where statutes do so provide, Section 4 – as quoted above – merely states that Sections 7 and 8 relating to hearings and decisions shall apply.) Thus Section 4 provides for publication of notice in subsection (a) and procedures short of hearing in subsection (b).

It may also be noted that the effective date of rules is to be deferred in accordance with subsection (c) of Section 4, which is thus designed in part to afford parties an opportunity to secure the correction of errors through informal representations before rules become effective (see the statement in the Senate Judiciary Committee print of June 1945 with reference to this subsection). Similarly the right of petition accorded by subsection (d) is designed to afford interested persons

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an opportunity to invoke rule making proceedings of an informal (or formal) character.

The essential point here to be made, however, is that Section 4 potentially covers rule making proceedings whether or not statutes provide for hearings. Even then, as indicated above, Section 6 for example may supply additional rights.

Informal Adjudication

The statute takes quite a different form so far as adjudication is concerned. In the first place, although Section 5 is entitled "Adjudication" it applies only to adjudications which other statutes empower or require agencies to make "after opportunity for an agency hearing". It thus does not purport to cover informal (or non-hearing) adjudications. As a result it may appear, superficially, that the statute makes no provision for administrative procedure in adjudications not required by statute to be made on, or after opportunity for, an agency hearing. On the contrary, however, the statute in effect—although perhaps not in appearance or form—provides fundamentally for informal adjudication procedures.

Unlike rule making, as a matter of fundamental law adjudication requires notice to the parties affected before administrative action may become final and binding without recourse. Sections 6, 9, and 10 of the Act take over from that point. Thus Section 6 (a) provides a statutory right to appearance and counsel, to present or seek an adjustment of any request or "controversy", to a speedy determination thereof, and to have in such procedures the "convenience and necessity of the parties or their representatives" consulted.

If an application is granted or if charges are settled to the satisfaction of the party, then of course no further procedure is necessary. Otherwise, Section 6 (d) provides for prompt notice by the agency of any "denial in whole or part of any written application, petition, or other request of any interested person" which must be "accompanied by a simple statement of procedural or other grounds". Such a statement of grounds must "in any case be sufficient to apprise the party of the basis of the denial" (Senate Committee Report, page 20). As a result, if the agency is acting upon a legally insufficient or immaterial ground, the party may have a more ready recourse to judicial review pursuant to Section 10.

In this same connection Section 9 (a) is also important. It provides that

> No sanction shall be imposed or substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

This provision is authoritatively said to embrace "both substantive and procedural requirements of law" (House Committee Report,

2. The term "informal procedure" is also appropriate in the relatively rare instances in which statutes require the agency to hold a form of "hearing" before taking action, but clearly indicate that the "hearing" is to be informal. The following statutory provisions are illustrative: Act of June 25, 1938, c. 675, Sec. 305, 52 Stat. 1045, 21 U. S. C. A. 335—see *United States* v. *Morgan, et al.*, 220 U. S. 274, 281 (1911); Act of August 9, 1939, c. 615, Sec. 408, 53 Stat. 1286, 7 U. S. C. A. 1598. Cf the procedure required of the Commodity Exchange Commission in connection with the fixing of limits on trading in futures on commodity exchanges, Act of September 21, 1922, c. 369, Sec. 4a, 42 Stat. 998, as amended, 7 U. S. C. A. 6a (1).

page 40). It should also be noted that Section 9 (b) supplies supplementary procedure and rights in informal (and also in formal) licensing (see the definition in Section 2 (e) and the Report of the House Committee, page 41).

Section 10 (e) (5) indicates that formal administrative adjudication—that is, adjudications made upon a statutory hearing—are to be reviewed upon the record thereof in the usual case. But Section 10 (e) (6) supplies the corollary by directing the reviewing court to set aside agency action found to be "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court" which, as the House Committee Report explains (page 28), would "require the judicial determination of facts in connection with . . . any . . . agency action to the extent that the facts were relevant to any pertinent issues of law presented". In other words, as stated by the sub-committee chairman during the discussion on the floor of the House of Representatives (32 A.B.A.J. 377 and the *Congressional Record*, May 24, 1946, page 5760):

> Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined *de novo* by the reviewing court.

It is thus made quite clear that, in informal adjudications (in which there is no statutory hearing), the relevant facts may be tried out on judicial review in case of controversy.

It may be noted, in concluding this phase of the matter, that Section 10 may operate in somewhat similar fashion respecting informal (or formal) rule making. But in the latter kind of action Section 4, as set forth above, expressly supplies informal procedure. In adjudications the implications of Section 10 with reference to informal proceedings are of perhaps greater consequence.

CONCLUSIONS

With reference to informal proceedings other than the consent dispositions first discussed in this article, the situation may be summarized as follows: In rule making the greater portion of Section 4 expressly supplies an informal method of proceeding, with incidental aid from Sections 6, 9, and 10. In adjudications, the only provisions for informal procedures are not express but exist in the generally applicable clauses of Sections 6 (a) and 6 (d) supplemented materially by the application or implications of Sections 9 and 10.

Why is virtually an entire section of the statute given to informal rule making, while no section or subsection expressly applies to informal adjudication? The reason would appear to be, simply, that a statutory right and form of informal rule making procedure had to be largely invented and hence was given a section of its own. Informal adjudications, on the other hand, have long been an established (although perhaps complex, fragmentary, and sometimes uncertain) phase of administrative law as applied by the federal courts so that it was more convenient to follow the general structure of the existing law in that respect with no more than the addition of such amplifying and clarifying provisions as are to be found in Sections 6 (a), 6 (d), and 10 (e) (6). As drawn, these sections have the additional virtue of being applicable in both rule making and adjudication and to both informal and formal procedures therein. Informal adjudication might have been treated separately, but it has been adequately handled in the Act in that manner. It is well worth careful study by both practitioners and administrators.

NOTE: *This is the first of two articles by Mr. Sellers. The second will appear in an early issue.*

Our readers have doubtless noted, and have shared our regret, that the texture and weight of the paper on which the JOURNAL *is lately printed are inferior to that of the paper we had used for many years. The present deficiencies in paper supply are in quality as well as quantity. Ours is a common experience nowadays, among the publishers of periodicals. As conditions have worsened, we have been glad to get the paper for issuance at all, even with our number of pages again curtailed.*

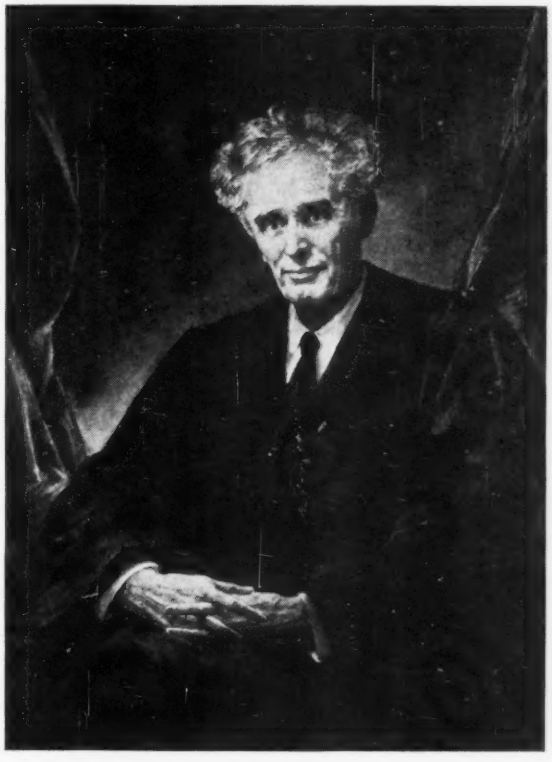
Louis D. Brandeis: Lawyer and Jurist

by Walter P. Armstrong

OF THE BOARD OF EDITORS

BRANDEIS: A FREE MAN'S LIFE. By Alpheus Thomas Mason.

Charles Warren has written an admirable study of the Supreme Court in United States history.[1] His essay is not, however, and does not purport to be, a comprehensive history of the Court. Such a work still offers a major challenge to American scholarship. The task would be greatly simplified if there were available an authoritative biography of each of the influential justices who has served on the Court. There are in the Court's library fifty-seven volumes dealing with the lives of twenty-six of the eighty-five Associate Justices and Chief Justices.[2] Mr. Justice Frankfurter has written that most of these are only "mortuary estimates", and has ventured the opinion that of them only Beveridge's *Life of John Marshall* is "adequate".[3] Since this depreciation was published—fifteen years ago—some additional biographies have appeared, of a quality that raises the general level of mediocrity.



Next in merit to Beveridge's *Marshall,* I am inclined to place Professor Mason's penetrating portrayal of Justice Brandeis. To call it "adequate" is to use the emphasis of understatement. Unless new facts transpire it is not likely that the future historian will have to look further, when he comes to fit the contribution of this particular Justice into the mosaic produced by the Court.

Professor Mason, undeterred by the lifted eyebrows of some of his colleagues at Princeton, has studied Brandeis for fifteen years. During that period he wrote two earlier volumes dealing with his biographee[4] before he began work on the present biography in 1940. None of this time has been wasted, nor has Professor Mason failed to take full advantage of the access to the Brandeis papers which was accorded him.

Brandeis as a Lawyer Is Emphasized

Much more went into the result, however, than indefatigable labor on source material. When I first leafed the book and learned that only about one-sixth was devoted to Brandeis' career on the bench, I had an anticipatory feeling of disappointment, because it was and is the judge in whom I am primarily interested. It seemed a dreary prospect to witness the stirring of the dust of the dead controversies in which Brandeis participated as "People's Attorney". However, by the time I came to the day when Brandeis took the oath of office I already had the key to his mental processes as a judge and, if I had not already known, could have inferred with reasonable certainty his reaction to any case that came before him.

Editor's Note: This sketch consists principally of a review of the outstanding biography published on September 23 (New York: The Viking Press. $5.00. Pages 713), written by Professor Alpheus Thomas Mason, of Princeton University. Mr. Armstrong has, however, obtained and taken into account other material, as is indicated by his text and footnotes. The Brandeis portrait above was presented to the Court in June, 1946, by Hadassah and hangs in the Lawyers' Lounge of the Supreme Court Building.

1. *The Supreme Court in United States History,* by Charles Warren (1922).

2. I am indebted to Miss Helen Newman, Associate Supreme Court Librarian, for a complete bibliography.

3. *Mr. Justice Brandeis and the Constitution,* by Felix Frankfurter. 45 Harvard Law Review, pages 33, 34.

4. *Brandeis: Lawyer and Judge in the Modern State* (1933), and *The Brandeis Way* (1938).

I do not know whether Professor Mason employed this means to point up Brandeis' stature in public affairs before he ascended to the bench, or to adumbrate his approach, predilections and methods as a judge. In any event he has used the Brandeis method of letting the facts speak for themselves, and there is a seamless projection of the lawyer into the judge.[5]

Concerning the Man Himself

Curiously enough, however, there is in all this very little of the man himself, although in Brandeis' life were the materials for a Horatio Alger success story. The son of Jewish immigrants, he partly defrayed his expenses at law school by tutoring, made more than a million dollars in the practice of law, and was the first of his race[6] to become a Justice of the Supreme Court. Professor Mason deals sparingly in personalia, and the impression he gives of Brandeis is one of aloofness bordering on austerity.

This cannot be attributed to lack of material, for among the papers turned over to Professor Mason, presumably without restriction, were many personal letters that passed between Brandeis and various members of his family; moreover, Professor Mason refers to a number of personal interviews he had with the Justice. The explanation probably is that this is the impression the subject made on his biographer; indeed, Professor Mason so intimates.

Simplicity and Independence in Living

One of Brandeis' former secretaries tells me that he is not in agreement with this estimate. He thinks that Brandeis created this impression because of the simple way in which he lived and which, in the beginning at least, was attributable to his desire to be independent and to the necessity which he felt for conserving his health, which was frail after he came to the Court at the age of sixty.

Added to this was, notwithstanding his public activities, a congenital shyness. My informant says that he found Brandeis to be "a very sympathetic and understanding person", and observed that his natural friendliness was more in evidence after he had retired and no longer felt under an obligation to conserve his energies for judicial work.[7]

Brandeis' Private Practice

Lawyer-readers will wonder at the paucity of references to Brandeis' private practice. This was one way of shedding light on Brandeis' character and methods. Certainly that is the result in the case of Lincoln. The explanation of the absence of any extended treatment of this phase of Brandeis' career is lack of source material, although Professor Mason made every effort to discover it. In fact, Brandeis had practically retired from the private practice by 1905.[8] Nor is there much record of his court appearances except in public cases prior to that time. The seal of confidential communications is on the door that, if opened, would disclose his conference technique and his office activities on behalf of his clients.

What is really given us is the history of a brilliant, original and daring intellect,[9] activated by an insatiable appetite for facts and implemented by tremendous energy.

Brandeis Made a Fortune in Law

It is not surprising that such a man with Boston as his base of operation should have made a fortune in the practice of law during the era of combinations, consolidations and exploitation. Inevitably while doing so he acquired an intimate knowledge of the intricacies of high finance and big business. What his former clients and associates could not understand was why he turned crusader and, unstimulated by the expectation of fees, used this knowledge to attack the class from which his professional business had come; why he came to prefer the companionship of Norman Hapgood and Lincoln Steffens to that of the members of the Somerset Club; why he allowed his resentful feeling that the public was usually inadequately represented to carry him to what seemed to them unpermissible extremes of advocacy.[10]

Some of His Notable Cases

Professor Mason tells with elaborate detail of Brandeis' part in resisting the efforts of the Boston Elevated to obtain franchises and in the fixing of the rates of the gas companies; of his leadership in the efforts to obtain legislative authority for the Massachusetts savings banks to write industrial insurance; of his long fight against the New Haven road; of his participation in the United Shoe Machinery cases; of his appearances before the Interstate Commerce Commission in railroad rate cases and of his share in the Ballinger-Pinchot investigation. Contests like these are usually, even to those engaged in them, as dry as "the desert's dusty face". Furthermore, it is often impossible for one who has not read the record,

5. One result is that Professor Mason's analyses of Brandeis' opinions, while more concise than some others, are also more easily comprehendible. Theirs is the advantage which the concrete has over the abstract.

6. Judah P. Benjamin was offered a justiceship but declined it because he had been elected to the Senate from Louisiana.

7. This same former secretary states that Brandeis was intensely interested in contemporary Washington politics. He adds that one aspect of Brandeis' character which was always interesting to him was his uncompromising firmness, especially in the moral sphere.

8. After that time Brandeis continued to head his firm, and received his share of the fees and retainers. His income from the practice averaged about $73,000.00 a year from 1901 to 1915. In 1917 it had dropped to $27,527.00 and thereafter was inconsiderable, evidently consisting of his share of fees from cases where final disposition or collection had been delayed. Brandeis left an estate of over $3,000,000. These figures are taken from a table Professor Mason has appended (page 691), which in exact figures gives Brandeis' income from all sources, beginning with 1915, and estimates it for the period from 1901 to 1915. The inclusion of this information will no doubt cause mingled feelings among Brandeis' admirers. Some will welcome the explanation of how he acquired his sizable estate; others will resent what they will consider an unwarranted intrusion on privacy.

9. Brandeis received the highest marks ever given by the Harvard Law School. *Mr. Justice Brandeis and the Harvard Law School*, by James M. Landis, 55 Harvard Law Review, page 184.

10. Few vigorous and effective advocates have escaped similar charges.

and frequently difficult for one who has, to determine where justice lies. But if this part of Professor Mason's story is sometimes difficult reading, it is rewarding in that it limns as nothing else could Brandeis' capacity, character and characteristics.

Brandeis' Methods as an Advocate

In all of these he was about "his favorite tack—investigating, analyzing, dissecting" (Page 338). Always he went his own way and refused to hunt with the pack. Here he cultivated the method that came to full flower in the Brandeis brief in *Muller* v. *Oregon*,[11] and in the Justice's powerful expositions supported by "succulent footnotes". He did not, however, rely entirely on what he later called "the logic of realities".[12] He not only welcomed, but actively sought, the aid of the press, both inspiring and himself writing articles and editorials. He was unsparingly severe in his cross-examinations and arguments and sometimes maintained positions that were sustained only by slight evidence.[13] But even as an advocate he could be judicial: In both the Boston gas controversy and before the Interstate Commerce Commission he made concessions which provoked the displeasure of his associates. He was not only as thoroughly versed in the law as the lawyers who opposed him, but as familiar with the mechanics of finance, business and railroad as were the witnesses who testified against his cause. He "probed more deeply than the immediate litigation seemed to require" and lost no opportunity to descant upon his favorite themes—especially his opposition to giantism either in government or business.[14]

Cases Which Made Influential Enemies

These cases not only gave Brandeis a national reputation but they raised against him many influential enemies. Those interested in the United Shoe Machinery Company never forgave him for what they considered his desertion. When he attacked the New Haven road he not only arrayed himself against powerful interests headed by the redoubtable J. P. Morgan, but he profaned one of New England's "sacred cows" worshipped by thousands of investors. Not a few, seeing among his supporters some of those who belonged to what Theodore Roosevelt called "the lunatic fringe", hated him for the friends he had made. If he was not conciliatory toward his opponents, neither was he diplomatic with his supporters, and his differences with them long continued to rankle.

The Fight Against His Confirmation as a Justice

These hostile fires that Brandeis lighted smoldered when it became known that he was being considered by Woodrow Wilson for Attorney General or Secretary of Labor; when his nomination to be an Associate Justice of the Supreme Court was sent to the Senate, they burst into full flame and almost devoured him.

One of Professor Mason's best chapters tells the story of the bitter fight against confirmation. The approach is objective, and the views expressed seem to be those that are likely to prevail. The most serious charges were those that accused Brandeis of unprofessional, or at least unethical, conduct. It was claimed that in the United Shoe Machinery case Brandeis used against the company information he had obtained when he represented it. Brandeis not only denied this, but insisted that he had not really changed sides; that when he had nominally represented the company, his real clients had been the small manufacturers; and that he became aligned against the company only because it broke faith with them. Professor Mason does not venture a judgment on this issue, but his inclination is to be critical. Every experienced lawyer knows that under such circumstances one cannot lean too far backward, and Brandeis' conduct seems to have been at least in questionable taste.

Cases in Which His Action as a Lawyer Was Criticized

Also from his private practice the Lennox and Warren cases were cited against him. In each case Brandeis had been consulted by a group, and one of the group asserted that the individual's interests had been sacrificed. Brandeis, however, apparently advised the course he considered wisest for all concerned, although, viewing the situations in retrospect, it might have been better if some of the parties had consulted outside counsel.

Brandeis was well within his rights in advocating the sliding scale in the Boston gas rate case, notwithstanding the criticism of the extremists who disapproved. In the rate case in which he represented no party but the Interstate Commerce Commission, he was but doing his duty when he elicited facts and voiced opinions favorable to the railroads whenever he believed that justice so demanded.

These were the only accusations with any specificity. Many others, however, objected to him because they considered him a self-advertiser and thought his type of advocacy, if not actually unethical, at least unfair and lacking in professional courtesy. Some fused all their criticisms into "a lack of judicial temperament".

Prominence of Opponents of His Confirmation

More gravity was given the charges by the prominence of those who made them than by the evidence which was adduced in their support. While Charles W. Eliot wrote a

11. 208 U. S. 412 (1908).

12. *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927).

13. President Taft's letter exonerating Secretary Ballinger stated that it was based on the opinion of Attorney General Wickersham, which was actually predated. Brandeis finally forced Taft to admit this. George Wharton Pepper "thought what had been done 'was not cricket', whereas Brandeis took the view that no public official had any right to have a private file and . . . there was nothing which was beyond the reach of whatever strategy could be invoked to get possession of it." (page 276).

14. One of Brandeis' repeated arguments against interlocking directorates was that it was impossible for directors to familiarize themselves with the affairs of a great number of corporations.

letter favoring Brandeis, President Lowell of Harvard joined fifty-four Bostonians in a petition declaring that one should be appointed "whose general reputation is as good as his legal attainments are great." Seven former Presidents of the American Bar Association[15] characterized him as "not a fit person". To one of them, William Howard Taft, former President of the United States and later Chief Justice while Brandeis was on the bench, the appointment was "a fearful shock".

Professor Mason's opinion appears to be that most "fought Brandeis because his philosophy of law and of society was alien to theirs" (page 490), because they considered him a radical and a traitor to his class and because he had violated Boston's unwritten code.[16] There are increasing indications that this will be the sustained verdict.

Opinion as to Him Changed

Indicative are the respect and admiration which Taft later expressed, and the action of the American Bar Association in sponsoring the placing of his bust in the Supreme Court Library.[17] At the time of Brandeis' death the rancor against him in Boston had entirely disappeared. Those who in the utmost good faith had fought him had come deeply to regret their actions.[18]

The controversy over Brandeis' confirmation did not mar his effectiveness on the bench. Professor Mason believes that his "great work was done, not in opposing the Court, but in leading it." (page 628). He points out that in four hundred and fifty-four of his five hundred and twenty-eight opinions, he spoke for the Court.

Brandeis' Meticulous Conduct in the Court

Brandeis was meticulous in his conduct as a Justice. He went over his investments with the Chief so as to be sure that they were not of such a nature as would disqualify him in many cases or interfere with his work. Twice (once upon the advice of Chief Justice White) he refused to accede to the request of the President that he undertake outside assignments. He let his opposition to the "court packing" bill become known, and joined with Chief Justice Hughes in a letter asserting that the Court was abreast of its docket, thus negating the insistence that additional Justices were needed.

He brought with him an enormous fund of knowledge and experience in dealing with the involved questions that were posed for the Court with increasing frequency. Professor Mason writes that in conference "the clarity, wealth, and exactness of Brandeis' information must have greatly impressed his colleagues." (page 629).

His Unique Contribution to the Work of the Court

His unique contribution was "the functional approach"—the extension of the scope of judicial notice so as to consider all relevant facts and relate them to the decision of the case in hand.

The Brandeis brief was metamorphosed into the Brandeis opinion. "Our function", he wrote, "is to determine in the light of all facts which may enrich our knowledge and enlarge our understanding."[19] He was the fulfillment of Holmes' prophecy that "for the rational study of the law the black letter man may be the man of the present but the man of the future is the man of statistics and economics."[20] His method slowly gained acceptance. Some of his brethren at first felt, as Justice Sutherland had written of one of the Brandeis briefs, that it was "interesting but only mildly persuasive."[21]

Fundamentals of His Juristic Philosophy

Avowing that "only the most credulous could believe that judicial decisions are 'babies brought by Constitutional storks'" (page 627), Professor Mason sees Brandeis "inclined by the pressures and drives of his own nature to translate his own economic and social views into the Constitution itself." (page 580). With eloquence not habitual Brandeis proclaimed his belief in the utmost freedom of speech unless there existed "a clear and present danger";[22] steadily he not only opposed monopoly but "the craze for bigness";[23] repeatedly he advocated the "prudent investment" theory as the controlling criterion in determining public utility rate bases.[24] And, although Professor Mason does

(Continued on page 698)

15. William Howard Taft, Elihu Root, Joseph H. Choate, Moorfield Storey, Simeon E. Baldwin, Francis Rawle and Peter W. Meldrim.

16. Professor Mason quotes Sherman L. Whipple: ". . . aloof . . . isolated" not enough of "the comradery of the Bar . . . took a delight in smashing a bit the traditions of the Bar, which most of us revere." (page 475). A section of the Bar believes that he "is mischievous and harmful." (page 480). Hollis R. Bailey: "He is not entirely trustworthy." (page 480). Moorfield Storey: "Ruthless in the attainment of his objects, not scrupulous in the methods he adopts, and not to be trusted." (page 480). And, with seeming approval, A. A. Berle: "They simply cannot realize, and do not, that a long New England ancestry is not *prima facie* a trusteeship for everything in New England." (page 481). Austen G. Fox: "It is true that nothing unethical has been proved against Mr. Brandeis. What has been proved against him is that he does not act according to the canons of the Bar." (page 506). Richard Hale: "A Boston aristocrat thinks that the straight and narrow path leads from the front bay window of the Somerset Club to the coupon room of the safe deposit vaults on State Street and back again. You should never plead fraud charges against a fellow State Streeter or Club member. On State Street it was and is bad form to hit too hard." (pages 507, 676, Note 46, Chapter XXXI).

17. Charles C. Burlingham broached this subject to me, and it was my pleasure to secure the approval of the Association. My successor as President, George M. Morris, delivered the presentation address. AMERICAN BAR ASSOCIATION JOURNAL, November 1942, (28 A.B.A.J. 760).

18. My authority for this is a letter from Reginald Heber Smith, of the Boston Bar.

19. *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1914; dissent). Professor Mason asks: "If judges really decide great constitutional questions according to their social and economic opinions, should they not make those opinions as informed as possible?" (page 581).

20. *The Path of the Law*. Collected Legal Papers (1920), page 187.

21. *American Column & Lumber Co.* v. *U. S.*, 257 U. S. 377, 415 (1921).

22. *Schenck* v. *U. S.*, 249 U. S. 47 (1919; dissent).

23. Professor Mason considers Brandeis' opinion in the Florida Chain Store case (*Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517 (1933; dissent).) as one of his greatest (pages 610-613).

24. Brandeis was at his best in arguing for the "prudent investment" theory. In my judgment none of his opinions surpassed his dissents in *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Com.*, 262 U. S. 276 (1922; dissent) and in *St. Louis & O'Fallon Ry. Co.* v. *U. S.*, 279 U. S. 461 (1929).

United States Senator Walter F. George

Our cover portrait this month is of the able jurist, experienced legislator, and distinguished public servant, Walter Franklin George of Georgia, truly a Senator of the United States. His personal modesty and disinclination for "gallery play" have withheld from him the conspicuous public recognition which his faithful service has richly earned.

He was born in Preston, Georgia, on January 29, 1878. He was graduated from Mercer College in 1900, and was awarded his degree in law a year later. He began the practice of law in 1901 in Vienna, Georgia, which is still his home. He was solicitor general of the Cordele Judicial Circuit from 1907 to 1912, a judge of the Superior Court of the same circuit for the five years following. In 1917 he was a judge of the Court of Appeals of Georgia until he resigned to become an Associate Justice of the Supreme Court of Georgia.

His judicial service was of outstanding fairness and capacity; he resigned from the bench in 1922 to become United States Senator. He is now serving his fifth term, which will expire in 1951.

"George of Georgia" has been one of the most useful members of the Senate. His ideals and his industry have at all times won for him the respect, affection and confidence of the sincere members of all parties, in both Houses of the Congress. His service as Chairman of the Senate's most important Committee on Finance, in charge of tax and revenue bills, during the war years and before, has been invaluable to his country. His leadership has "held the line" against all manner of innovations by which it was proposed to use the taxing power to re-distribute earned income and lifetime savings. He has done much to staff the work of the Joint Committee of the two houses and to put it on an expert and scientific basis.

Throughout his legislative career, he has held to an independent course, and has courageously said "no" to the Treasury Department and the White House on many occasions. His opposition to the "court-packing" proposal as to the Supreme Court was from deep conviction. His attitude on this and other measures aroused hostility on the part of National leaders of his party, and he was made a conspicuous target for a "purge" to rid the Senate of his independence and courage. The powers and patronage of the presidential office were used against him; but Georgians were proud of his independence, and he was returned to the Senate.

Because of his manifest qualifications and experience for judicial work, he has often been mentioned as most worthy of appointment to the Supreme Court. He has never concealed that such an appointment would fulfill his highest ambitions, and his long service at a Senator's salary would have made the higher judicial compensation attractive for his remaining years.

Yet, it is known that on several occasions, when friends importuned him to permit the presentation of his name, "George of Georgia" demurred, on the conscientious ground of his conviction that the future of his country depends on the wise, sound handling of the taxing power and the reduction of taxes when governmental expenditures and debt charges permit. He did not feel free to consider leaving his present post of responsibility. At another time, when friends sought to bring forward his name for appointment as Secretary of State, he expressed a like view of a public duty paramount to personal ambitions.

The State of Georgia, and the profession of law which he adorns, have abundant reason to be proud of this statesman of the sterling type; and the Nation justly is grateful for the many duties which he has performed so independently, so unostentatiously and so well.

United Nations Week. *Because of the further postponement of the convocation of the General Assembly to October 23, the National Broadcasting Company and its cooperating organizations, which include the American Bar Association, have postponed from October 20 to 26, both inclusive, the carrying out of the comprehensive plans for a Nation-wide demonstration of the Association's declaration for "united American support for The United Nations".*

Historic Declaration as to World Court Filed by the United States

We record here an historic event—the filing on August 26 of a Declaration by the United States accepting as obligatory upon it the jurisdiction of the International Court of Justice, for the submission and peaceful decisions of legal disputes, in the enumerated categories, with other Nations which have similarly bound themselves.

America became thus obligated, for the first time in its history, when Trygve Lie, Secretary-General of The United Nations, received at Lake Success, Long Island, the deposit of the Declaration, from Herschel V. Johnson, the North Carolina lawyer (32 A.B.A.J. 426) who is the temporary delegate to the Security Council. The Declaration, for which the American Bar Association had long led the fight, had been authorized by the Senate on August 3 by a vote of sixty to two. Its execution by President Truman took place on August 14; it is to be in force until 1951 and thereafter until the United States gives six months notice of termination.

World Peace and Law Are Supported

The ceremonial on August 26 took place with repetitions for the newsreels. "My action today in depositing this declaration, accepting on behalf of the United States the compulsory jurisdiction of the International Court of Justice," said Delegate Johnson, "is further testimony to the determination of my government to do all in its power to assure that The United Nations will fulfill the role assigned to it, which is nothing less than the preservation of world peace."

One of the principal functions of The United Nations in the maintaining of peace, he said, is the development of "procedures of pacific settlement". The best way of assuring the growth of international law is to allow a responsible international tribunal to deal with all disputes that properly fall within its jurisdiction, he added.

"We accordingly look forward to a great development of the rule of law in international relations through a broad acceptance of the function of the Court in the spirit of the Charter."

Acceptance of the Declaration

For The United Nations, Trygve Lie, the Norwegian lawyer who is its Secretary-General, responded that "This ceremony today is an important occasion for both the United States and The United Nations. It marks a very important step forward in bringing the rule of law into relations between the nations. I am sure that it will be encouraging to all of the nations of the world both large and small, to know that the United States of America has taken this formal action."

The United Nations and The Netherlands have lately filed declaration under the present statute of the Court. Many other nations are adhering to their Declarations under the former Statute, which are continued in force.

Provisions of the American Declaration

The document executed by President Truman and deposited with The United Nations follows closely

Trygve Lie accepts World Court Declaration from Herschel Johnson.

the language of the Morse Resolution (S. 196 as amended), and so the language of the Statute and of the Resolutions adopted by the House of Delegates (32 A.B.A.J. 9). The exceptions are two-fold: (1) The Vandenberg amendment (which lately has begun to give rise to some unforeseen questions), by which the Declaration binds the United States only if all of the parties to a multilateral legal dispute have similarly bound themselves in advance to accept the Court's jurisdiction and decision; and (2) The controversial Connally amendment adopted by a vote of fifty-one to twelve in the Senate, whereby the United States reserved to itself, rather than left to the Court, the right and power to decide as to whether an international dispute involved a "domestic question" and so is outside the jurisdiction of the Court and The United Nations.

"We do not propose to submit to the jurisdiction of any tribunal at any time the right to say whether a question is a 'domestic' question", said Senator Connally in urging his amendment. "I think we have a right to adhere one hundred per cent if we choose, and we have the right not to adhere at all. Between these two extremes we have a perfect right to adopt this amendment, because the charter provides that 'domestic' questions shall not be considered."

Elsewhere in this issue, Professor Lawrence Preuss states his views as to this amendment.

In any event, the step long sought and urged by the American Bar Association has been taken, and the filing of the American Declaration is a part of history.

Author of "Going It Alone" Wins $3,000 Ross Essay Prize

A very human "success story" of the type for which the American Bar offers opportunities to young lawyers came to culmination on September 8, when the Board of Governors of the Association awarded the $3,000 Ross Essay Prize for 1946 to Eugene C. Gerhart, 34-year-old member of the Junior Bar Conference practising in Binghamton, New York, for the best essay-discussion of "Labor Disputes —Their Settlement by Judicial Process".

When Gerhart came out of the Navy, he decided to practice law "on his own", in Binghamton, a city of about 78,000 people in the southern tier of counties in New York State. The many practical problems confronting a young lawyer in opening his own law office and starting out to build his own law practice prompted him to write for the JOURNAL an article which has been most helpful to others: "Going It Alone" (32 A.B.A.J. 397).

Evidently he had some time on his hands, along with a flair for research and writing. When the sealed and numbered envelope containing the name of the author of the winning essay was opened, the name inside it was that of this member of the Junior Bar. He has won the coveted honor and money, in competition with many able lawyers, teachers of law, and specialists in the law of labor relations.

EUGENE C. GERHART

The Committee which read the essays and selected the one it believed to be the best consisted of Orie L. Phillips, of Denver, Senior United States Circuit Judge for the Tenth Circuit; Dean Robert H. Wettach, of the University of North Carolina Law School, and Alvin Richards, of Tulsa, Oklahoma. The vote of the judges was unanimous.

The award and $3,000 check will be formally bestowed at the Annual Meeting in Atlantic City on October 31. The winning essay, which is a meritorious and well-documented discussion of a problem of paramount public interest, will be published in full in our November issue.

Gerhart was born April 7, 1912, in Brooklyn, New York. He received his A. B. at Princeton University in 1934, and LL. B. from Harvard Law School in 1937. He was admitted to the New Jersey Bar in 1938 and to the New York Bar in 1945. During World War II, he served as a Lieutenant on duty with the Bureau of Aeronautics.

Meanwhile, members of the Association will recall gratefully the foresight and devoted interest which led the late Judge Erskine M. Ross, of Los Angeles, California, to make his beloved Association the beneficiary of his testamentary gift which has led to so many worth-while contributions to the discussion of great public questions. Judge Ross became a member of the Association in 1914, and was active in it until his death in 1928. The Ross Prize was first awarded in 1934, and the first winner was Carl McFarland, of Washington, D. C.

P. S. A re-reading of "Going It Alone" leads to the observation that its author can probably use the $3,000.

Know Your Sections in the Association

The purpose of this article is to give information, to all members of the Association and other lawyers interested, concerning the numerous Sections which have been created to carry forward various phases of the Association's work for the profession and the public, the scope and activities of each Section, its officers and Council members, its publications useful to lawyers, the amounts of Section dues (if any), the steps to be taken to become a member of a Section and the like.

As the Association has undertaken to do more and more which is useful to its members, the Sections have increased in number and have played an increasingly important part in the Association's many-sided work, but always "in furtherance of the unity of the law as a science" (Constitution, Article IX, Section 1).

In the nature of things, the programs in the Assembly have to be of interest to the general membership, while the House of Delegates has to cope with heavy calendars of special matters reported for information, debate and action. The Sections provide the forums for considering special subjects in the law or particular activities of the organized Bar.

Self-Organization and Limited Autonomy

Basically, a Section is created by the self-organization of a large group of Association members who are interested in specialized study and discussion of a particular subject or in the furtherance of a particular objective of the Association. A Section nominates and elects its own officers and Council, creates and appoints its own Committees, chooses and plans its own programs of meetings and work within its authorized field.

Its structure, scope and its procedures are controlled by a standard set of By-laws, which originate with the Section or the organizing Committee but require the approval of the Board of Governors and the House of Delegates. A majority of the Sections require the payment of Section dues of $1, $2 or $3, to help finance their publications and work.

The Chairman of each Section is *ex officio* its voting representative in the House of Delegates. As is the case with recommendations of a Committee, the recommendations of a Section have no force or effect unless and until they have been submitted to and approved by the representative House of Delegates.

Each Section offers to its members the opportunity for acquaintance, the exchange of views and experiences and social intercourse, among lawyers interested in the specialized field, as well as a forum for discussion, the development of recommendations, the study of specialized subjects and the publication and distribution of the resultant useful material.

First Section Was Created in 1893

The first Section created was that of Legal Education and Admissions to the Bar, which dates from 1893. The Association now has seventeen Sections, two of which have been added during the past year. There are a total of about 25,000 memberships in the various Sections, of which about 16,000 are in dues-paying Sections. However, many members of the Association belong to two or more Sections. Approximately 12,000 members of the Association belong to at least one Section.

In practically every instance where a Section has been formed, a Standing or Special Committee had been in existence for some years, to deal with the subject in behalf of the Association. As the particular field of law expanded in interest and importance to the profession and a need was deemed to arise for broadening the facilities for study, discussion and action within the Association, a proposal to create a Section was broached. Detailed consideration was then given, by the Board of Governors and the House of Delegates, to the number of members who would be interested in and attracted by the Section if it were created, its potential usefulness in practical fields of work and the suitability of its field of law for the deliberations of a Section rather than the action of a compact but representative Committee. If and when these considerations were resolved favorably, a new Section was created.

The Sections Give Experience for Association Leadership

Because of the number of the Sections and their simultaneous meetings, usually for the most part on Tuesdays of convention week, during at least a part of which day the House of Delegates may be also in session, the Sections create considerable difficulties in program-building for the Annual Meeting; but their sessions are usually well attended, and are marked with lively interest.

Many of the Presidents of the Association, and many members elected to the Board of Governors, have first gained experience in Associa-

tion work by serving as Chairmen of Sections.

Any member of the Association who wishes to be enrolled in a Section, or in several Sections, may do so by writing to the Association and enclosing a check for the stated amount of dues. Any lawyer who is not a member of the Association must first become such, to enroll in a Section. In the case of the Junior Bar, any member of the Association who is under 36 years of age is automatically enrolled as a member of the Junior Bar Conference.

Sections Are Limited to Work for the Public and the Profession

As the Sections are an organic part of the Association's structure and are in some respects autonomous "little Bar Associations" within the Association, they are provided for and regulated by the Constitution and By-laws. The principal provisions are in Article IX of the Constitution, but some further provisions are in the By-laws.

The basic condition (Article IX, Section 1), is that "the work of the Association and Sections shall be at all times in furtherance of the unity of the law as a science and in the interest of the profession and the performance of its public obligations" and that "consistently therewith, there shall be the following Sections for carrying forward the work of the Association".

Present Sections and Their Establishment

Irrespective of changes in the names of some of them, the present Sections of the Association and the dates of their organization are the following:

Name	*Date of Establishment*
Section of Legal Education and Admissions to the Bar	1893
Section of Patent, Trade-Mark and Copyright Law	1894
Section of Judicial Administration	1913
Section of Public Utility Law	1918
Section of Bar Activities	1920
Section of Criminal Law	1920
Section of Mineral Law	1926
Section of International and Comparative Law	1933
Section of Insurance Law	1933
Section of Real Property, Probate and Trust Law	1933
Junior Bar Conference	1934
Section of Municipal Law	1935
Section of Corporation, Banking and Mercantile Law	1938
Section of Taxation	1939
Section of Administrative Law	1946
Section of Labor Relations Law	1946

National Conference of Commissioners on Uniform State Laws, founded in 1890, has in some respects the status of a Section, but in others is a quasi-official and public agency operating under the auspices of the Association.

Dues Paying Sections

Of the seventeen Sections, eleven have Section dues in force, to help finance their own work and publications. A list of these Sections, with the amounts of dues required to be paid for Section membership, is as follows:

Section	*Amount of Dues*
Administrative Law	$3
Corporation, Banking and Mercantile Law	2
Insurance Law	3*
International and Comparative Law	2
Labor Relations Law	3
Mineral Law	2
Municipal Law	2
Patent, Trade-Mark and Copyright Law	2
Public Utility Law	2
Real Property, Probate and Trust Law	2**
Taxation	3

* Pending action by the Section in Atlantic City

** Effective as of July 1, 1947

Officers and Councils of the Sections

The following is a list of the names and addresses of the officers of each Section and the members of its Council, all as now constituted in advance of the 1946 Annual Meeting:

ADMINISTRATIVE LAW

Chairman ..... Carl McFarland, 744 Jackson Place, Northwest, Washington, D. C.
Vice Chairman ..... Sylvester C. Smith, Jr., 18 Bank Street, Newark, New Jersey
Secretary ..... Patricia H. Collins, Board of Immigration Appeals, Washington, D. C.

COUNCIL

Albert Ewing, Jr., Stahlman Building, Nashville, Tennessee
Reuben Hall, 30 Federal Street, Boston, Massachusetts
Ralph M. Hoyt, 735 North Water Street, Milwaukee, Wisconsin
Charles E. Lane, Hynds Building, Cheyenne, Wyoming
Roland F. O'Bryen, Boatmen's Bank Building, St. Louis, Missouri
Mayo A. Shattuck, 15 State Street, Boston, Massachusetts
Julius C. Smith, Jefferson Standard Building, Greensboro, North Carolina
Burt J. Thompson, Forest City, Iowa

BAR ACTIVITIES

Chairman ..... Charles B. Stephens, First National Bank Building, Springfield, Illinois
Vice Chairman ..... Russell E. Booker, Law Building, Richmond 19, Virginia
Secretary ..... Miss Emma E. Dillon, Broad Street Bank Building, Trenton, New Jersey

COUNCIL

Ex officio ..... The Officers, and—
Loyd Wright, *Last Retiring Chairman*, 111 West Seventh Street, Los Angeles 14, California
For term ending 1946 ... Robert M. Clark, General Claims Attorney, A. T. & S. F. Ry. Co., Topeka, Kansas
Roy C. Ledbetter, Box 900, Dallas 1, Texas

For term ending 1947....Frank B. Belcher, Security Building, Los Angeles 13, California
Paul B. Cromelin, National Press Building, Washington 4, D. C.
For term ending 1948...James C. Dezendorf, Pacific Building, Portland 4, Oregon
Charles O. Rundall, 135 South LaSalle Street, Chicago 3, Illinois
For term ending 1949...Paul B. DeWitt, Association of the Bar of the City of New York, 44 West 44th Street, New York 18, New York
Carl B. Rix, Wells Building, Milwaukee 2, Wisconsin

CORPORATION, BANKING AND MERCANTILE LAW

Chairman.....Sidney Teiser, Morgan Building, Portland 5, Oregon
Vice Chairman.....Benjamin Wham, 231 South LaSalle Street, Chicago 4, Illinois
Secretary.....Henry C. Shull, 1109 Badgerow Building, Sioux City 9, Iowa

COUNCIL

Ex officio.....The Officers, and—
J. Kemp Bartlett, *Last Retiring Chairman*, U. S. F. & G. Building, Baltimore 2, Maryland
For term ending 1946....Frank W. Davies, Jackson Building, Birmingham 3, Alabama
Frank C. Olive, Chamber of Commerce Building, Indianapolis 4, Indiana
For term ending 1947....Martin J. Dinkelspiel, 333 Montgomery Street, San Francisco 4, California
John Gerdes, 1 Wall Street, New York 5, New York
For term ending 1948...William B. Cudlip, National Bank Building, Detroit 26, Michigan
John W. Kearns, 38 South Dearborn Street, Chicago 3, Illinois
For term ending 1949...Frederick W. Brune, 2500 Baltimore Trust Building, Baltimore 2, Maryland
Milton P. Kupfer, 29 Broadway, New York 6, New York

CRIMINAL LAW

Chairman.....James J. Robinson, 152A Supreme Court Building, Washington 13, D. C.
Vice Chairman.....Earl Warren, State Capitol, Sacramento 14, California
Secretary.....James V. Bennett, Department of Justice, Washington 25, D. C.

COUNCIL

Ex officio.....The Officers and—
For term ending 1946....Wendell Berge, Department of Justice, Washington 25, D. C.
Charles P. Taft. First National Bank Building, Cincinnati 2, Ohio
For term ending 1947....Audrey J. Freund, 506 Olive St., St. Louis 1, Missouri
Wayne L. Morse, 348 Senate Office Building, Washington 25, D. C.
For term ending 1948...Lester B. Orfield, 1313 East 60th Street, Chicago 37, Illinois
John R. Snively, 401 W. State Street, Rockford, Illinois
For term ending 1949...T. Lamar Caudle, Department of Justice, Washington 25, D. C.
John J. Parker, Federal Building, Charlotte 2, North Carolina

INSURANCE LAW

Chairman.....V. J. Skutt, 3316 Farnam Street, Omaha 1, Nebraska
1st Vice Chairman.....J. Harry LaBrum, Packard Building, Philadelphia 2, Pennsylvania
2nd Vice Chairman.....Thomas Watters, Jr., 116 John Street, New York 7, New York
Secretary.....John F. Handy, 1295 State Street, Springfield 1, Massachusetts

COUNCIL

Ex officio.....The Officers and—
Henry S. Moser, *Last Retiring Chairman*, 77 West Washington Street, Chicago 2, Illinois
For term ending 1946....Thomas N. Bartlett, Maryland Casualty Company, Baltimore 3, Maryland
Henry W. Nichols, 4 Albany Street, New York 6, New York
For term ending 1947....Ralph H. Kastner, 230 North Michigan Avenue, Chicago 1, Illinois
Oliver H. Miller, Equitable Building, Des Moines 9, Iowa
For term ending 1948...Hugh D. Combs, U. S. F. & G. Company, Baltimore 3, Maryland
Joseph W. Henderson, Packard Building, Philadelphia 2, Pennsylvania
For term ending 1949...Franklin Marryott, 175 Berkeley Street, Boston 10, Massachusetts
Elmer Warren Sawyer, 45 Christopher Street, New York 14, New York

INTERNATIONAL AND COMPARATIVE LAW

Chairman.....Edgar Turlington, 1416 F Street, Northwest, Washington 4, D. C.
Vice Chairman.....Frederic M. Miller, State House, Des Moines 19, Iowa
Secretary.....Charles S. Rhyne, 730 Jackson Place, Northwest, Washington 6, D. C.

COUNCIL

Ex officio.....The Officers and—
For term ending 1946....David E. Grant, 1 Wall Street, New York 5, New York
James Oliver Murdock, 1824 23rd Street, Northwest, Washington 8, D. C.
For term ending 1947....Edward W. Allen, Northern Life Tower, Seattle 1, Washington
Amos J. Peaslee, Justice House, Clarksboro, New Jersey
For term ending 1948...Robert E. Freer, Federal Trade Commission, Washington 25, D. C.

William Roy Vallance, 3016 43rd Street, Northwest, Washington 16, D. C.

For term ending 1949...Mitchell B. Carroll, 67 Broad Street, New York 4, New York

George M. Morris, American Security Building, Washington 5, D. C.

JUDICIAL ADMINISTRATION

Chairman.....Bolitha J. Laws, U. S. District Court for District of Columbia, Washington 1, D. C.

Vice Chairman.....Robert G. Simmons, Supreme Court, Lincoln 9, Nebraska

Secretary.....Will Shafroth, Administrative Office of the U. S. Courts, Washington 13, D. C.

COUNCIL

Ex officio.....The Officers and—

Laurance M. Hyde, *Last Retiring Chairman,* Supreme Court Building, Jefferson City, Missouri

For term ending 1946...Armistead M. Dobie, Box 297, Charlottesville, Virginia

Earl Welch, State Capitol Building, Oklahoma City 5, Oklahoma

For term ending 1947...Curtis Bok, Court of Common Pleas, City Hall, Philadelphia 7, Pennsylvania

Paul J. McCormick, Post Office & Court House Building, Los Angeles 12, California

For term ending 1948...Frederic M. Miller, State House, Des Moines 19, Iowa

John J. Parker, Federal Building, Charlotte 2, North Carolina

For term ending 1949...James P. Alexander, Supreme Court, Capitol Station, Austin 11, Texas

Arthur T. Vanderbilt, 744 Broad Street, Newark 2, New Jersey

JUNIOR BAR CONFERENCE

Chairman.....Lyman M. Tondel, Jr., 31 Nassau Street, New York 5, New York

Vice Chairman.....James D. Fellers, Apco Tower, Oklahoma City 2, Oklahoma

Secretary.....T. Julian Skinner, Jr., Phillips Stanley Building, Jasper, Alabama

COUNCIL

Ex officio.....The Officers and—

Charles S. Rhyne, *Last Retiring Chairman,* 730 Jackson Place, Northwest, Washington 6, D. C.

First Circuit .....Harris A. Reynolds, 84 State Street, Boston 9, Massachusetts

Second Circuit.....Louis Lisman, 158 Bank Street, Burlington, Vermont

Third Circuit .....Robert A. Detweiler, Lewis Tower Building, Philadelphia 2, Pennsylvania

Fourth Circuit.....C. Keating Bowie, Jr., Mercantile Trust Building, Baltimore 2, Maryland

Fifth Circuit.....Robert W. Gwin, 1730 Granville, Bessemer, Alabama

Sixth Circuit.....Arthur M. Sebastian, A. I. U. Building, Columbus 15, Ohio

Seventh Circuit.....Walter B. Keaton, 109 North Main Street, Rushville, Indiana

Eighth Circuit.....Ray Nyemaster, Jr., Register and Tribune Building, Des Moines 9, Iowa

Ninth Circuit.....James E. Burns, 111 Sutter Street, San Francisco 4, California

Tenth Circuit.....Raphael J. Moses, Box 217, Alamosa, Colorado

District of Columbia....J. Edward Bindeman, Woodward Building, Washington 5, D. C.

LABOR RELATIONS LAW

Officers and members of the Council of the newest Section are as follows:

Clif Langsdale, Chairman, Scarritt Building, Kansas City 6, Missouri

John M. Niehaus, Vice Chairman, 1 North LaSalle Street, Chicago 2, Illinois

Alexander Hamilton Frey, Secretary, University of Pennsylvania Law School, Philadelphia, Pennsylvania

COUNCIL

Roy H. Glover, Butte, Montana

Robert D. Morgan, Peoria, Illinois

Clarence Mulholland, Toledo, Ohio

Joseph A. Padway, Washington, D. C.

Donald R. Richberg, Washington, D. C.

Sylvester C. Smith, Jr., Newark, New Jersey

LEGAL EDUCATION AND ADMISSIONS TO THE BAR

Chairman.....Joseph A. McClain, Jr., Railway Exchange Building, St. Louis 1, Missouri

Vice Chairman.....Arthur T. Vanderbilt, 744 Broad Street, Newark 2, New Jersey

Secretary.....G. W. Parker, Jr., Fort Worth National Bank Building, Fort Worth 2, Texas

Adviser.....Laurence W. DeMuth, 2237 Sixth Street, Boulder, Colorado

COUNCIL

Ex officio.....The Officers and—

Albert J. Harno, *Last Retiring Chairman,* Altgeld Hall, Urbana, Illinois

For term ending 1946....H. Claude Horack, Duke University Law School, Durham, North Carolina

Carl B. Rix, Wells Building, Milwaukee 2, Wisconsin

For term ending 1947....Herbert M. Bingham, Tower Building, Washington 5, D. C.

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Questions Resulting From The Connally Amendment

by Lawrence Preuss

PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF MICHIGAN,
PRINCIPAL SECRETARY OF THE UNITED NATIONS CONFERENCE OF JURISTS AT WASHINGTON, D. C.

On August 26 The President filed with the Secretary-General of The United Nations a Declaration accepting on the part of the United States the compulsory jurisdiction of the International Court of Justice. This act will generally be hailed as one of the great events in the history of international adjudication, and as marking a resumption of the leadership which the United States once held in the promotion of international peace by judicial means.

Acceptance of the compulsory jurisdiction had been advocated, by a nearly unanimous and nonpartisan opinion, as a step by which this country would reaffirm its allegiance to the ideal of the rule of law among nations and fulfill its pledge as a member of The United Nations to "bring about by peaceful means, and in conformity with the principles of justice and international law," the settlement of international disputes which might threaten the peace of the world.

These were the purposes and ideals which motivated Senator Morse and his colleagues in sponsoring the Resolution (S. Res. 196) authorizing The President's Declaration. This Resolution had been drafted in consultation with experts in the field of international judicial settlement, had received public endorsement by The President and the Secretary of State, and was approved in principle by the American Bar Association and the American Society of International Law. After public hearings the Senate Committee on Foreign Relations reported it favorably and unanimously, in the form in which it had been introduced.

There appeared, therefore, to be every basis for the confident expectation that the Senate, in approving the Resolution, would give at last its full and unstinted support to a measure which would enable the United States to match by actual achievement its long-professed loyalty to the principle of international adjudication. It is a cause for regret — although not, perhaps, for surprise—that the Senate's approval, given on August 2 by a vote of 60-2, was qualified by the addition of an amendment which is contrary to the very principle of the compulsory jurisdiction which we were purporting to accept.

The Reservation by the Connally Amendment

The amendment, introduced by Senator Tom Connally, added the italicized phrase to the reservation of "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States, *as determined by the United States.*"

The reservation of matters of "domestic jurisdiction" had been included in the original Resolution with the purpose of allaying fears which had become traditional with the Senate and had been expressed in like reservations annexed by it to treaties of arbitration and other international agreements of the United States. An express reservation concerning domestic matters was in itself unobjectionable, although superfluous for the reason that the International Court, bound by the terms of its Statute "to decide in accordance with international law," would in any event decline jurisdiction in disputes which *by* international law are reserved to the exclusive competence or domestic jurisdiction of states (such as control of immigration, regulation of tariffs, etc.).

Reservations as to "Domestic Jurisdiction" in Other Treaties

This limitation is contained in the series of arbitration treaties initiated in 1928 by the treaty with France, and appears in the General Treaty of Inter-American Arbitration of 1929 as a reservation of controversies which "are within the domestic jurisdiction of any of the Parties and are not controlled by international law." The British Government, out of deference to apprehensions expressed by the Dominions, had in 1929 made a similar reservation in accepting jurisdiction under the Optional Clause of the former Statute. This reservation, the official memorandum stated, "is merely an explicit recognition of a limitation upon the jurisdiction of the Permanent Court which results from international law itself. It is merely the application in this connection of the principle that, subject to any relevant treaty stipulations, a state is entitled to regulate as it pleases matters which

fall exclusively within the domain of its sovereignty."

Following the British example, a number of states attached a reservation of domestic matters to their acceptances under the Optional Clause, and eight countries other than the United States (Australia, Brazil, Canada, Great Britain, India, Iran, New Zealand, and South Africa), are now subject under that condition to the compulsory jurisdiction of the new Court, by virtue of Article 36 (5) of its Statute, which provides for the carry-over of prior declarations.

The principle which underlies such reservations is fully recognized in international law. Acts performed by a state within the sphere of its domestic jurisdiction may closely affect the interests of other states, but of their expediency it remains the sole judge. But it is one thing to recognize, as did the Morse Resolution in its original form, that states retain their freedom of action in matters not regulated by international law. It is quite another proposition to demand, as does the Connally amendment that a state shall itself be the exclusive judge of whether a particular policy or act which gives rise to controversy with another state possesses a domestic or an international character.

United States Alone Reserves the Decision to Itself

Among the states which have accepted the compulsory jurisdiction of the International Court of Justice or of its predecessor, the United States is alone in reserving the right to determine unilaterally whether any given question is or is not one of domestic jurisdiction, and therefore should, or should not, be submitted for adjudication. Other states, in accepting the jurisdiction of the Court under Article 36 (2) of the Statute, have uniformly regarded this question as being itself "a question of international law," to be decided by judicial means and not by the unilateral fiat of an interested party.

This view, implicit in the original Morse Resolution, was taken in the Report of the Foreign Relations Committee, which stated: "The question of what is properly a matter of international law is, in case of dispute, appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case for adjudication on the plea that it is a matter of domestic jurisdiction. It is plainly the intention of the Statute that such questions should be decided by the Court, since Article 36, Paragraph 6, provides: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.' . . . A reservation of the right of decision as to what are matters essentially within domestic jurisdiction would tend to defeat the purposes which it is hoped to achieve by means of the proposed declaration as well as the purpose of Article 36, Paragraphs 2 and 6 of the Statute of the Court."

A "Political Veto" on Judicial Questions

The Connally amendment, in providing for unilateral rather than international determination of the scope and application of the reservation, gives to the United States, to use Senator Morse's words, "a political veto on questions of a judicial character." It conditions the obligation to adjudicate upon a further expression of consent after a specific dispute has arisen, and is, therefore, incompatible with the very conception of compulsory jurisdiction, the purpose of which is to ensure the adjudication of disputes upon the application of a single party. The amendment leaves the United States in substantially the position it has occupied under earlier treaties of arbitration, which contain merely "an agreement to agree." It may, however, be accounted an advance over previous practice that the determination provided in the amendment will be made on the part of the United States by The President alone, and not, as in our treaties of arbitration, with the advice and consent of the Senate.

The Connally amendment is all the more destructive of any real obligation for the reason that it is attached to a reservation which contains a vague and indefinite phrase unknown to international law: "*essentially* within the domestic jurisdiction." The first Morse Resolution (S. Res. 160) which was introduced on July 28, 1945, had referred to questions which "*by international law* fall exclusively within the domestic jurisdiction." This phrase, which properly defines the matters reserved in terms of the law by which they are delimited, is found in Article 15 (8) of the Covenant of the League of Nations, where it was inserted upon demand by the United States. It is found also in the reservations of domestic matters contained in the acceptances of other states bound by the compulsory jurisdiction of the Court.

The phrase "by international law" was replaced in S. Res. 196 by the term "essentially" solely for the purpose of bringing the language of the Resolution into line with that of Article 2 (7) of the Charter, which employs the latter term. The word "essentially" had been introduced into the Charter by an amendment offered by the four sponsoring Governments. It was defended before a committee of the San Francisco Conference by Mr. John Foster Dulles, who argued that it furnished a more satisfactory criterion of matters domestic than did the established formula, since international law, he said, is "subject to constant change and therefore escapes definition."

A "Standard" Which Eludes Definition

It is difficult to understand what it was hoped to gain by substituting for one standard, allegedly too indefinite, another which completely eludes definition. The novel term "essentially" may be appropriate in such a political instrument as the Charter, where flexibility of methods and procedures for the settlement of political disputes may be desirable. In any event, the term was adopted as a "formula" precisely because it has no ascertainable meaning, and therefore served the purpose of concealing, and postponing for future

agreement, the wide disagreement over the proper scope of the activities of The United Nations which prevailed at San Francisco.

But this loose formula should find no place in an instrument defining the jurisdiction of the International Court of Justice, which is bound to decide "by international law." By the terms of the Morse Resolution, event without the Connally amendment, the Court is deprived of a guiding principle of ascertainable meaning, and it seems doubtful that the Court, if acting judicially, would be in a position to pronounce upon a matter of so highly subjective a content.

Serious Questions Raised by the Reservation

To the indefiniteness of the expression "essentially within the domestic jurisdiction of the United States," the Connally amendment adds a further element of imprecision and imprevision by providing that in any specific controversy the term shall have such application and scope as may be "determined by the United States." The reservation, in the form in which it is included in The President's Declaration may, therefore, serve to withhold from the jurisdiction of the Court precisely those disputes which were reserved under earlier treaties as affecting the "vital interests, independence, or the honor" of either of the parties.

An international engagement conditioned by such opportunities for evasion is possibly, as Professor Lauterpacht has contended, an obligation "without the *vinculum juris*. An obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond."

Declaration May Be Invalidated

There is a further possibility that the amended reservation may legally invalidate the United States Declaration, as offending against the fundamental principle of the Statute that the Court shall have the power to decide disputes concerning its own jurisdiction, including questions as to the meaning or effect of reservations. There can be no doubt that declarant states may exclude certain classes of disputes from the jurisdiction of the Court, subject to the provision of Article 36 (6) of the Statute. This is implicit in Article 36 itself, was established by unquestioned practice under the former Statute, and was reaffirmed at the San Francisco Conference.

It may be argued, however, that such a reservation as that of the Connally amendment stands upon a wholly different footing, since it purports by the unilateral decision of an interested party to suspend the operation of an express provision of the Statute, conferring upon the Court a power which is obviously essential if the scheme of compulsory jurisdiction is to be effective. A declarant state accepts jurisdiction *under* the Statute, and to attempt to deprive the Court of the power to determine the scope of its own competence is to deny the essence of the obligation envisaged by the Statute.

"Judge in One's Own Cause"?

In his attack upon the validity of the Connally amendment, Senator Pepper took this general view: To attach the original reservation, and then to superimpose another upon it, he declared, "flies, first, into the very teeth of the purpose and concept of the Court, and in the second place, into violent conflict with subparagraph 6 of Article 36. . . . If there is anything fundamental in the law, it is that one cannot be the judge of his own cause. Yet here we are laying down in one reservation that the World Court shall not have jurisdiction over domestic matters, and in the second place that we will decide whether or not a matter is domestic. . . . We take the Court as one takes his spouse, for better or for worse. We cannot say, once we admit its jurisdiction, that it may exercise only a limited part of its authority by the Statute, and exclude another part when we happen to be affected. . . . Once we give authority for compulsory jurisdiction to attach, then the law as embodied in Article 36 of the Statute becomes effective, and we cannot by reservation in conflict with and in opposition to the Statute authority limit the jurisdiction of the Court."

American Attitude Toward Compulsory Jurisdiction

The United States at San Francisco supported Soviet Russia in resisting the demand of nearly all other states that acceptance of the compulsory jurisdiction of the International Court of Justice be made universal among all members of the United Nations. In urging a continuation of the optional plan it could then plead the necessity of such a system as a *sine qua non* of Soviet membership in The United Nations and the Court, and as a possible prerequisite of the Senate's approval. The Senate, in acting upon the Resolution which Senator Morse and his colleagues had proposed with high purpose and promoted with outstanding eloquence and skill, had an opportunity to take a great stride forward toward the goal of achieving peace through law.

In qualifying and compromising its acceptance of the jurisdiction of the Court by an amendment conceived in suspicion and inspired by fear, the Senate has implied one, or perhaps all, of the following attitudes: Mistrust of the competence and integrity of the Court; lack of confidence in the soundness of our legal position in the world today; or a determination to maintain any position, even *contra legem*, which the United States as a great Power may choose to assume. Senator Connally's amendment not only impairs the moral significance of our declaration; it may conceivably deprive it of any substantial practical effect.

One may, perhaps, be pardoned in repeating a parable once told by M. Fernandes, the great Brazilian jurist who was the "father" of the Optional Clause. It is summed up in a dialogue in which the small states question the great:

(Continued on page 721)

"Books for Lawyers"

AN HONORABLE TITAN: *A Biographical Study of Adolph S. Ochs. By Gerald W. Johnson. August, 1946. New York: Harper and Brothers. $3.50. Pages ix, 313.*

Those of us who, at any age or stage of life, have had something to do with the Fourth Estate, in some capacity however humble, feel like taking "time out" now and then to record our appreciation of the personality and public service of Adolph S. Ochs. The present occasion is the publication of Gerald Johnson's biography of him, fifty years after he became the publisher of the New York *Times*, and eleven years after his death.

My reasons for taking this department's space to tell lawyers something about Ochs are not wholly personal. It has long seemed to me that an independent, fearless newspaper as Ochs conceived it is veritably like a Bar Association—one of the invaluable institutions of American freedom. Each should be trustworthy and faithful in its reporting of the facts upon which informed opinions should be based. Each should be independent, bold, fearless in presenting its well-considered opinions, but its views and policies should not shape or select the facts. Each should be actuated by the public interest, should not be servile to government or patrons and should not lend itself to any selfish objectives or personal ends. Each must reflect the zeal, capacity and courage of many men; neither institution can last long as "the lengthened shadow" of one personality or a few.

Adolph Ochs was a great publisher who never tried to become an editor. He had the genius to build and to lead, to set a standard rather than to dictate the manner in which it was lived up to. He realized that a truly independent newspaper, like any other human institution, has to be and be kept solvent and well run. A newspaper "on the ragged edge" of financial disaster becomes craven; bad management in the front office has silenced many a fearless pen. In a newspaper as in any other institution of freedom, some of the indispensable men do no intrepid reporting of facts and write no persuasive statements of views; the services of those who keep the house in order financially and give the security of good management are just as essential, although less conspicuous. Ochs took a great paper which was nearly bankrupt from "personal journalism" and put the solid rock of financial stability under the feet of those who were fulfilling the function of getting the news and giving it straight.

But for this the *Times* could not have become a medium depended on, by men and women in all parts of the United States and the world, for the full factual coverage which is not supplied by newspapers which have filled their pages with "comic strips", syndicated "gossip", "bridge" lessons, hints for "health" and other chatty and humorous material, but give sparse and scant backgrounds of the world's great events. Ochs never lowered his sights or cheapened the contents of his paper. "If all of you go into that field," Kent Cooper heard him say to a group of publishers, "you will lift the New York *Times* to a conspicuous eminence as a newspaper, since it will not do so. For that reason I could selfishly hope that you will. But I do not hope it."

Ochs learned early, perhaps in Tennessee, another characteristic which a great newspaper has in common with an independent Bar Association. He chose usually to present both sides of vital questions as well as the *Times'* own views when they were formed, which often took time. For this the *Times*, again like a representative Bar Association, was and is criticized sharply by the extremists, who want to see only their own notions of facts in print and to have only their own pet ideas advocated. Ochs seemed surest of his course when both "wings" were protesting vehemently. Says Gerald Johnson:

> He was incessantly denounced by radicals, and that is well known, for they did it publicly and as loudly as they could: what is not so well known is the frequency with which he was denounced by reactionaries, for they usually did it privately, although not less violently. . . . He was a conservative, but only in the sense that he believed it wise to make haste slowly; he never believed in standing still or in trying to go backward.

Gerald Johnson is of a capable generation of American biographers, historians and magazine writers who never saw or worked for or with Adolph Ochs. If he had done so, I doubt if he would have chosen the title he did. I do not think the kindly Ochs thought of himself as a "titan" —or was one. Johnson mentions, for contrast – other "titans" – Carnegie, Hill, Morgan, Rockefeller, Wanamaker—and prefixes "honorable" to single out his subject, which again may be needlessly unjust to others.

It seems to me that Johnson made his initial mistake in putting Ochs in a category in which he does not belong. He refers to Ochs as a "merchant of ideas." I agree with Kent Cooper that this is too limited a concept and a most inept one. Ochs was not "selling" ideas, in the competition of any market place, any more than a church or a university or a Bar Association "sells" facts or ideas. His standards were not of merchandizing or mass production. He was

truly of a *profession*—that of ministering to the public's need for trustworthy news and considered views—his ideals were those of contributing to the enlightened public opinion of his time.

Ochs' own life is a tribute to the American system of private enterprise and individual opportunity which he so staunchly sought to preserve. He was born in Cincinnati; his Old Testament father took him to Eastern Tennessee, then in the throes of the privations of Reconstruction days. When his father failed in business, the son gave up school at the age of 11 and went to work as a carrier boy for the Knoxville *Journal*, at 25 cents per day. Successively he was a printer's devil, apprentice printer, a roving journeyman printer, then a drug clerk and store clerk in Providence, Rhode Island.

But the smell and stain of printer's ink never get off one's hands completely; soon he was "hitting the road," with his "stick" in his back pocket, wandering for a job. Truly great characters in America have had a composing room as their Alma Mater. More than a few journeymen printers of the old days were among the best informed, most kindly, sagacious, well-poised and lovable philosophers I have ever known. They rarely had moorings or business sense, but America lost something when they disappeared into "homes" of the Typographical Union or died, and were superseded by rapid-fire "linotype operators" who do marvellous things with machines but rarely know the fonts of type. Henry George, Adolph Ochs and Walt Whitman, were among these alumni of printshops. Ochs never forgot his schooling and his struggles, but he also learned in the hard way the art of building and making a newspaper truly independent.

With two colleagues from "the case" in a Tennessee shop, he took over a Chattanooga paper which was "on the rocks", made a failure of it, struggled to get out a city directory, and finally "bought" the Chattanooga *Times* on a working capital of $12.50. Success in management in Tennessee led him to New York, where he wangled the little capital needed then to acquire the great paper which had staked its all to help a great lawyer, Samuel J. Tilden, crush the "Tweed ring"—the *Times*' last "crusade".

Two paragraphs from Ochs' avowals of his faith are worth reading and treasuring by lawyers, for here we, too, take our stand:

> The people, as they gain culture, breadth of understanding and independence of thought . . . more and more demand the paper that prints the history of each day without fear of consequences, the favoring of special theories or the promotion of special interests.
>
> Of course, there should be an editorial policy—that we all know. And that editorial policy should be strong and firm as to the big issues of the day. Now, the men who form that policy may be right or wrong, from various viewpoints. A newspaper cannot please all readers. But whatever that policy is, it must be the honest belief of those who form it and it must be adhered to firmly and honestly and fearlessly.

Why has not America gone the way of the totalitarian countries? Is not one of the reasons the fact that America has had, and still has, great independent newspapers, of which the *Times* is but one, which tell the truth boldly and clearly and keep public opinion more alert and informed than it is in other countries? Would England have yielded to Labor-party Socialism if the newsprint shortage had not reduced its journals to mere bulletins—who can tell?

And why are the courts of America, as a whole, still the instrumentalities of law-governed justice, and its legal profession stirred to plain talk and action in the face of the dangers which beset our country? Is it not because independent Bar Associations, independent newspapers and fearless leaders of the churches, dare here to speak out, against government if need be, and always against the infiltrations of Communism by whatever "sugar-coated" name it has been called?

Americans should cherish and support *all* of our institutions of freedom and justice, in our own country and in the world which so profoundly influences us; and American lawyers should be vigilant to defend always the freedom of the press and to honor those who have built and preserved these citadels of liberty. Here your JOURNAL, as the only independent National magazine which does not depend on advertising or solicited circulation, has its mission and its mandate, from the lawyers of America.

WILLIAM L. RANSOM

New York

I TOO, NICODEMUS. *By Curtis Bok. New York: Alfred A. Knopf. September 12, 1946. $3.50. Pages 349.*

The gifted President Judge of the Court of Common Pleas No. 6 in Philadelphia has written humanely and sympathetically of the array of situations which a trial judge meets in his daily work. The book is neither a novel nor a collection of court stories, but rather the portrayal of a cross-section of the experiences of a working judge.

Born in Pennsylvania in 1897 as the son of Edward Bok, the famous publisher and author, Curtis Bok was graduated from the University of Virginia, practiced law in Philadelphia, was a Judge of the Orphans Court of Philadelphia County and in 1937 was elevated to his present post. He has been a member of the American Bar Association since 1936. He will be remembered as the author of *Backbone of the Herring*, which created the kindly character of Judge Ulen. This reviewer suspects that the author has put into the book much of his own philosophy and practice in judicial work. The present work is heartening reading, because it makes one feel better about judges and about all sorts and conditions of men. It may well be turned to as one judge's answer to the challenges put to the courts by a brilliant editor's address, which is published elsewhere in this issue.

CASES AND MATERIALS ON JUDICIAL ADMINISTRATION. *By Maynard E. Pirsig. St. Paul: West Publishing Company. June 1946. $6.50. Pages xxvii, 1017.*

Law school casebooks are not popular reading with lawyers, and this reviewer does not suggest that Judge Pirsig's volume will constitute an exception. Justification for discussing it here lies rather in the challenge which it presents to law schools to begin early the task traditionally undertaken by bar associations, frequently too late for good results, of inducing lawyers to recognize more fully the social and public responsibilities of their profession.

A standard complaint of older lawyers concerning young men fresh from law school has been that "they know a lot of theoretical stuff but they haven't got enough practical information". Many good law schools today are trying to overcome these complaints to varying extents by the use of "realistic" casebooks, summer "interneships" in lawyer's offices, legal clinics of one kind or another and special practice courses, even including "Office Practice". For the most part, however, this "practical" and "realistic" teaching is given with a realization, now common to both professors and practitioners, that not everything can be taught in law school, and that the principal value of clinics, interneships and the like is to give law students a better background for intelligent appreciation of the subject matter of the standard law courses, so that they may for example see a Bills and Notes case in terms of the banking or real estate transaction out of which it arose rather than as an abstraction in theories of the nature of good faith and consideration.

A closely related and superficially paradoxical complaint, arising mostly in recent years, is that the graduates of the schools are too much immersed in the problems of law as law—perhaps even in the "practical aspects of the law"—and do not have a proper understanding of the lawyer's obligations as a member of the organized profession or of the profession's place in the society to which it must justify existence. Thus it has been said that the law schools do little more than prepare their graduates, adequately or inadequately, to make a living out of society by practicing law in it, and that they place too little emphasis on the return which the lawyer or the Bar should render to society in the form of a judicial system organized to achieve a maximum of justice and a legal profession organized to achieve a maximum of useful service to society.

Despite understandable exaggeration as to how little students learn in law school, the fact is that young men often do go through good law schools without learning anything about the organization or programs of local or State Bar Associations, about the American Bar Association and the Junior Bar Conference, about the American Judicature Society, about the machinery which has variously been set up for handling discipline and grievances and dealing with the unauthorized practice of law, about plans for promoting more efficient modes of selecting judges, extending the rule-making power of courts or unifying judicial systems, about the work of judicial councils and about dozens of other matters with which public-spirited lawyers and bar groups constantly concern themselves.

Traditional courses in legal ethics, now seldom offered in the schools, too often dealt with too few of such matters, and handled the rest in a Sunday School fashion not satisfying to adult students. Professor Cheatham's casebook on *The Legal Profession*, published in 1938, avoided the old pitfalls and set forth a body of teachable cases and "materials" which, had the War not intervened to prohibit desirable expansion of curricula, would undoubtedly have been employed effectively in many law schools to acquaint young lawyers somewhat with the ethical standards and the formal organization of their profession. Judge Pirsig's new casebook goes beyond Professor Cheatham's principally in the increased wealth of interesting material which it contains (it is nearly twice as long as the earlier volume) and in the greater number of important topics dealt with. Like Cheatham's work, it is compiled for adult readers, and classes using it should not languish either from inertia or disinterest.

Good teaching tools are not indispensable to good teaching, and important subject matter may be well taught without any formal teaching tools. Without such tools, however, it is less likely to be well taught, or taught at all. From the view of those interested in the things that good bar associations strive for, there is reason for cheer in the fact that it is much easier today to give students a fair understanding of the function of the legal profession in a democratic country than it was a decade ago.

ROBERT A. LEFLAR

Fayetteville, Arkansas

HIROSHIMA: A REPORTER AT LARGE. *By John Hersey. The New Yorker, August 31, 1946. 15 cents. Pages 45.*

Can any thing or any person arouse the American people to open their eyes to see and their ears to hear what is being told them about atomic energy? Or must the atomic bomb speak for itself in all its explosive power so that, while millions perish horribly, the fragment that may be left can learn?

The way to understanding had been opened by such widely read authors as H. G. Wells and by the universally seen "comic" strips which daily reveal the exploits of Buck Rogers and Superman.

The scientists' first worry was that they could not stop the chain reaction once they had started it; not one informed person was positive how Fermi's controlled experiment in Chicago would end. Their present and even greater worry is how to make plain to the peoples of the world the fate that may await them.

(Continued on page 699)

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

An Opportunity for Lawyers to Speak

In a report recently presented to the Supreme Court the Advisory Committee recommends a number of important amendments to the Rules of Civil Procedure. Elsewhere in this issue is an excerpt from an article prepared by Walter P. Armstrong as to the nature and scope of the amendments.

The purpose of most of the recommendations is clarification of the rules so as to eliminate ambiguities disclosed by the experience of seven years. There are, however, some important changes. The desirability of many of these is self-evident, and most of them were incorporated or at least adumbrated in the first or second draft of the amendments which were widely discussed by the Bench and the Bar. Of this type are amendments abolishing the bill of particulars, broadening the scope of relief by motion from judgments, providing for judgments on multiple claims and fixing the practice when both a motion for new trial and a motion for judgment are filed. Differences among the Circuit Courts of Appeal are settled by requiring a written finding of facts in cases tried with an advisory jury and when on motion of the defendant there is a dismissal "on the merits" at the end of the plaintiff's case.

Especially to be noted is the reduction of time allowed for appeal from a District Court to a Circuit Court of Appeals from three months to thirty days in all cases except those "in which the United States or an officer or agency thereof is a party", and to sixty days in such cases.

Unfortunately the most controversial amendment is one as to which there has been little discussion because it was not generally known until the Report was filed. This amendment permits delving into an adversary's investigation file where "denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injury." The proposed amendment applies to investigations made by lawyers except that it expressly protects from inspection any "writing that reflects an attorney's mental impressions, conclusions, opinion or legal theories."

This is a radical departure from the practice to which many lawyers are accustomed, and it will be opposed by many as an unwarranted invasion of files. An opportunity to be heard as to it will be welcomed by many lawyers.

A disappointing feature of the Report is the failure to include a uniform condemnation rule. There will never be any truly uniform Federal procedure until the outmoded conformity practice is eliminated in eminent domain cases.

The Advisory Committee has not, however, confessed an inability to make headway on this issue. A condemnation rule was included in the first draft of the amendments. This proposal was immediately criticized as being too favorable to the condemnor and as not effectuating uniformity because it excepted proceedings instituted by the TVA and would not apply in the District of Columbia. The Committee withdrew this proposed rule, and it does not appear in the final draft which accompanies the Advisory Committee's Report to the Court.

A sub-committee of the Advisory Committee has now revised this rule for consideration. At the Committee's request we print its full text in this issue. Seemingly the revision has been approved by interested governmental authorities but has not yet received the sanction of the Advisory Committee itself.

The re-draft of this rule came to us just before the "deadline" for this issue—too late for complete analysis or extended discussion. However, first examination discloses that while it is less favorable to the condemnor than was the rule first proposed, it is still objectionable because of the exceptions retained. Obviously further consideration is essential.

Both the submitted amendment broadening the scope of "discovery" and the unapproved draft of a condemnation rule will be made the subject of discussion at an "open forum" session of the Assembly at Atlantic City during the week of October 28. The Board of Governors wisely voted for this in Chicago on September 8. Judges, lawyers and teachers of law, are invited to attend and speak their views. This is in accordance with the previous "open forum" at the Boston meeting and the institutes held under Association auspices as to the original Rules.

The work of the Advisory Committee is generally so excellent that it should not be marred by these defects, especially as they can be easily remedied. A proper rule as to condemnation procedures should be formulated. After the "open forum" has disclosed the

views and suggestions of the Bar, the Advisory Committee should file a supplemental report in time for the Court to include any additional recommendations in the amendments which it promulgates and transmits to the Attorney General.

The 1946 Annual Meeting

At the end of this month, members of the Association will assemble in Atlantic City under the leadership of President Willis Smith and Chairman Tappan Gregory of the House of Delegates, for the Sixty-Ninth Annual Meeting.

This will be the first full-scale meeting of the Association since 1941. The days of curtailed and limited meetings are happily over, with the ending of the conditions which caused them. The attendance of members this year may not be as large as it customarily was before the war, but the advance reservations indicate a fully representative gathering, despite travel conditions not yet wholly favorable.

The program which has been arranged is attractive. Important issues are to be debated and decided, in each the Assembly and the House. Members who have not yet decided and arranged to come to this meeting will find it well worth their while to attend.

Those who come to Atlantic City will have abundant reasons for satisfaction with the legislative and other accomplishments of this Association year. The chief cause for gratification, however, is the fact that the lawyers of America are rallying to the standard of the Association in greater numbers than ever. The current gains in membership are impressive.

More than 38,000 lawyers will be enrolled in the Association at the end of October. A great deal of well-organized work has contributed to this, but the basic fact has been that the Association attracts and deserves the support of lawyers for its great objectives. The number of members, at the stated periods, tells the story:

1930	28,667	1943	30,968
1936	28,228	1945	34,134
1941	30,834	1946	37,303 (thus far)

Every additional member means that the JOURNAL and other publications of the Association go into another lawyer's office and home in some community, to carry from month to month the message of the concerted efforts to improve the administration of justice, to promote the ideals and interests of the profession of law, to maintain popular respect for and confidence in the courts, to curb the abuses in the administrative agencies, to preserve the fundamentals of constitutional government in the United States and to extend the rule of law, justice and organized cooperation for peace among all Nations.

This is a good time for the lawyers of America, through their representative Assembly, House of Delegates, Sections and Committees, to meet, take council, exchange experiences, make plans, discuss and vote their views on questions important to the profession and the public. Assistance and impetus to an informed public opinion on vital issues will result from the 1946 meeting of the Association, and we urge every member to come if he can. Our November and December issues will report fully the proceedings.

"Courts, Departments and Agencies"

Further to fulfill the Journal's policy of being of assistance to practising lawyers, judges, teachers and students of law, and lawyers in the service of government, we announce a new department, to appear monthly under the above title. We shall plan for its appearance first in our November issue.

Our purpose will be to assemble and publish in it such items of news, information, etc., as may save the time of our readers and help them in their daily work. News as to rulings, regulation, interpretations, decisions, amendments, developments as to practice and procedure, will be included; but we do not contemplate an inclusive coverage or selective service as such.

We hope that members of the Association will find in it information that will interest and assist them, but they cannot expect to substitute it for the facilities and services on which they customarily depend.

Necessarily, we shall proceed by experimentation and by trial and error, to find what may be the most informative and useful type of items for the new department. Its scope may be broadened or its form changed as experience points the way. We shall be glad to receive at any time the suggestions, and particularly the criticisms, of our readers.

Amount of Annual Dues

Responsible leaders of the Association, who have been especially identified with its sound financial management during the period of sharply increasing costs of printing, materials and supplies, clerical forces, as well as administrative assistance, have filed a proposed further amendment, relating to Article II of the By-laws of the Association, to be voted on at the Atlantic City meeting on October 28.

The proposed amendment is published on another page. Notice of it has been given also in the Advance Program pamphlet.

The proposal does not increase the annual dues for Association membership, which have been stationary since 1927. It authorizes a change in the amount of dues if such action is deemed to have become necessary or advisable. With the markedly higher costs of prac-

tically everything which enters into the carrying on of the Association's work, it seems to be simply good business sense to put the House of Delegates, on the recommendation of the Board of Governors, in a position to deal with the situation as need arises.

The effectiveness of the Association's expanding work requires adequate revenues and prudent, careful management. Many State and local Bar Associations now have dues in force which are larger in amount than those which the American Bar Association has had in effect since 1928. As shown in the forceful statement by Lane Sumners of the Washington State Bar, published with "Bar Association News" elsewhere in this issue, State Bar Associations are increasing their dues to finance programs of aggressive work.

Other amendments of the Constitution and By-laws, which are to be voted on by the Assembly and House in Atlantic City, were published in our September issue (page 588). Members should examine these, too, and make known their views about them.

For the Public and the Profession

At its Annual Meeting this month, the Association and various of its Sections and Committees will come to grips with two practical problems which are important to clients and the public, as well as to members of the profession of law. As is its custom, the Association will endeavor to develop, agree upon and recommend, practicable measures to end existent abuses which have caused a great deal of concern to lawyers throughout the country.

As was recognized at the time it was under consideration, there are two serious problems which the Administrative Procedure Act does not meet and solve. One is that of the burdensome requirements placed on the admission of lawyers to practice before administrative agencies. Not only is this time-consuming and bothersome, but it tends to create an atmosphere of being permitted to practice by favor rather than as of right, and does not make for a vigorous and outspoken representation of the client's cause. In some instances, these requirements have been claimed to have been used for actual discrimination and repression.

The other abuse is the uncontrolled or lightly controlled admission of laymen to represent clients before many of the agencies. This has often led to the inept and inadequate representation of clients before some agencies, by comparatively untrained laymen who lack the ethics, the skills and the courage, of members of an independent profession.

The Association's Committee (now its Section) on Administrative Law was aware, from the first, that its bill did not cope with these abuses. Two things stood in the way of overcoming the deficiency at that time: Adequate provisions to cover both problems had not been brought to the point of the considered draftsmanship which would ensure their acceptability and efficacy; and there was a practical unanimity of opinion, on the part of those who were on the firing-line for the Association's bill, that these practice problems would have to be dealt with as a second step, through general regulations and further legislation. Chicago and other local Bar Associations opposed the enactment of Section (6), sub-division (a), of the bill as it stood. Samuel Micon, of the Chicago Bar, discusses the problems, elsewhere in this issue.

The new Section of Administrative Law will discuss the problems intensively at Atlantic City. The Committee on Unauthorized Practice of Law will be at work jointly with the Section on remedial proposals. Members of the Association are invited to express their views at the Section meeting. Expert and experienced draftsmanship will embody the considered judgment.

The outcome will be an urgent measure on the Association's program for 1946-47. There is assurance that carefully formulated proposals will be actively supported in the Congress.

Law Offices for Persons of Moderate Means

It is an established constitutional principle that no man shall be denied justice because he is penniless. The words on the facade of the United States Supreme Court Building are: "Equal Justice Under Law." This principle is given effect through legal aid work. We know how to provide high-grade professional assistance to the poor, efficiently and economically. Legal aid offices must be developed more rapidly, but at least we have learned how to solve a practical problem that had to be solved in a democracy if its legal institutions were to hold the respect of millions of its citizens.

There is now shaping up a problem that is identical in principle but which is so vast and whose ramifications extend so far that an entirely different solution will have to be found.

As the "poor" now produce over 300,000 applicants for legal aid every year, it is believed that persons in the next higher economic bracket would produce over 3,000,000 clients a year. These persons are able to pay a fee but not a full fee. We call them (because all terminology in this field is unsettled) "persons of moderate means." We can herein suggest only a few of the many ways in which this problem fans out.

Legal aid offices do not compete with the Bar. Experience has shown that law offices for persons of moderate means may sound now like a direct competition. But do these people go to lawyers at all now? There is some evidence that they do not, but does anyone really know? We should find out.

Many students of legal education believe there is a serious gap between what a man learns in law school

and what he ought to know before he can decently be admitted to *practice*. No State will license a doctor on merely his academic education and his theoretical training in a medical school. The mistakes of a lawyer untrained in practice may be less dramatic than those of a surgeon, but they are none the less serious.

Are law offices for persons of moderate means, with their unlimited "clinical" material, the perfect answer for an apprenticeship-internship training in actual practice *under supervision* to be required after law school but before admission to the Bar?

If, in this fast-changing era, a sudden and insistent demand for such offices arises, will the organized Bar be ready with a constructive answer or will the filling of the need go by default to some governmental agency or to labor and commercial organizations?

Those with their ears to the ground report that the rumblings are coming nearer. In 1938 this Association's Committee on the Economic Condition of the Bar published its Manual and raised, directly or by implication, these very questions. With the passage of time, the emphasis has shifted, and the Association's Committee is now called the Special Committee on Legal Service Policies.

Law school men are now giving the subject serious consideration from the point of view of legal education, probably as post-graduate work. The Legal Assistance Officers of the Army and Navy have directly asked our profession "to whom and through what channels do we refer cases of soldiers and sailors who are not applicants for charity, who can pay something but ordinarily cannot pay full fees?" Labor unions have established for their members "counselling" on such things as economics, budgeting, health, and are considering the addition of "legal counselling."

There is growing an uncomfortable feeling that persons of moderate means are turning away from lawyers to lay agencies because such agencies are cheaper and more efficient, and because they can and do advertise their existence and service. If there is no basis for such a feeling, it is hard to understand how many such agencies can exist at all.

Just as the different aspects of the problem are disparate, so the men who are thinking about it or who could help with their information or experience are widely separated. There is no coherent, articulated attack on an admittedly complex problem.

To provide a forum where ideas on so vital a subject can be pooled and information exchanged, the JOURNAL invites all who are thinking about it to contribute short articles on any aspect of the problem and on any side of it.

If this invitation evokes from our members a response of material really worth while, we shall arrange it, together with suitable comment, in symposium form and present it to our readers in a subsequent issue or issues.

Repercussions of the Connally Amendment

The thoughtful article which Lawrence Preuss contributes to this issue, in exposition of the substantial questions which are raised by the Senate's adoption of the Connally amendment to the Morse Resolution (S. 196) for American acceptance of the compulsory jurisdiction of the World Court, may serve also to "high light", to an extent perhaps not intended, the present critical situation as to the "organized international cooperation" which was expected to follow World War II.

American lawyers had confidently hoped and expected, we believe, and their House of Delegates had repeatedly urged, that the United States would accompany or follow its ratification of the Charter and its participation in The United Nations with the filing of a Declaration within the explicit terms of Article 36, sub-division 2, of the Statute of the World Court. That earnest hope is not likely to be abandoned by American lawyers until it is fulfilled. At the same time, the vote of 50 to 12 in the Senate on August 3, to write into the Morse Resolution a reservation or condition by which the United States would make its own unilateral determination as to whether it had bound itself to submit a particular legal dispute to the World Court, has a significance, as a part of the larger present picture, which goes far beyond the questions which Professor Preuss discusses as to the Court.

Article 36, sub-division 2, of the Statute, states reservations which a declarant Nation may make. Article 36 and any Declaration filed under it are of course subject to the provision of Article 2, sub-division 7, of the Charter that nothing in the Charter (or the annexed Statute) shall "require" any Nation to submit for settlement under it by any organ of The United Nations (which includes the Court) any "matters which are essentially within the domestic jurisdiction of any state". But sub-division 6 of Article 36 of the Statute provides expressly that: "In the event of a dispute as to whether the Court has jurisdiction"—it would have none in a dispute as to "domestic" affairs—"the matter shall be settled by the decision of the Court". American lawyers had, we think, generally assumed that ratification of the Charter and the Statute, and any action taken under Article 36, would be subject to the mandate of sub-division 6.

The large majority in the Senate, and many other Americans, do not view the matter in that light, even as to the Court, during the present critical juncture in world affairs. The fundamental philosophy of this country, and of all or most of the other Principal Powers in The United Nations, is applied even to the peaceful adjudication of legal disputes. Senator Connally, Senator Vandenberg, and others in high place, have made it clear that although the United States seeks whole-hearted *cooperation* with other member Nations as such, it joins with them in reserving unto

itself full freedom of decision and action, even as to submitting to the Court legal disputes which seem to it to involve questions essentially internal and domestic.

A re-survey of fundamentals may help public understanding at this juncture. Disappointment and confusion have arisen in the minds of more than a few people, who had assumed that the Charter of The United Nations brought into being some kind of a "world government", although limited in its powers. No international "government" was intended in San Francisco; use of the word has caused confusion and discouragement, because "government" connotes, to Americans, a structure and powers not provided for The United Nations at all.

The basic Moscow Declaration, obtained by Secretary Cordell Hull on October 30, 1943, recognized

> "The necessity of there being established at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to all such states, large and small, for the maintenance of international peace and security".

The fundamenal concept has ever since been "organized international cooperation" for peace, security and law. In endorsing the great objective, the Association's House of Delegates referred to it on September 12, 1944 (30 A.B.A.J. 545) as "the continued consultation, association, agreement and organized cooperation, of The United Nations". "Cooperation" may have thus far failed, at many points; "agreement" has been too often withheld; the "veto" power has been too often used, even to frustrate majority decisions. But all that was in the letter, if not the spirit, of what was agreed to at Moscow, at Yalta, at Dumbarton Oaks, and at San Francisco. Each of the Principal Powers reserved its right to make unilateral decisions and withhold cooperation, at least on matters of substance. The United States has now adhered to this view, even as to the World Court.

The United Nations was not given the structure, the attributes, or the powers, which are characteristic of "government". Representative "government" connotes minority acceptance of majority action, unless the organic law is contravened, also, the power of a law-governed Court to decide what the organic law means and forbids, whether particular parties want the Court to decide it or not.

Not so this association of Nations. The Organization has no president or executive head; the Secretary-General has made his office one of vast usefulness and some powers, but he is, after all, only what his title implies. The presidency of the Security Council, rotating monthly, carries little more than the duties of a presiding officer. The Security Council itself, with eleven members, is neither the executive of the Organization, nor a legislative body. Through it the five Principal Powers, with "non-permanent" delegates from six other Nations, confer and debate, and are supposed to endeavor to cooperate, agree and act, as to what shall be done to settle disputes at the political level and restore peace and security to a troubled world.

The potentialities of the General Assembly, as the great public forum of the fifty-one Nations, have not yet been realized, because it has held only its organizational sessions. Much is expected of it, as a means of crystallizing the moral opinion of the free Nations of the world. But it has no powers to *legislate* in the sense of passing laws or adopting measures which are binding upon any country in the absence of its free and subsequent consent. "Legislation" is by treaty or convention, which any nation may ratify or reject; that method of legislation is not characteristic of "government".

As to the World Court, the Charter and the Statute made it clear that the Court was not given a jurisdiction automatically obligatory as to a member Nation. Only by its own voluntary and affirmative decision and Declaration, or by express provisions of its voluntary treaties or conventions, was a Nation to be bound to submit its disputes to the Court. And the Senate of the United States has undertaken to reserve to this country the right and power to decide for itself, at the time a dispute comes up, whether the dispute is one which this country chooses to withhold from the Court. Only on the desperate issue of saving civilization from the atomic bomb has the United States urged that any of the Principal Powers should give up or modify its individual prerogative of refusing cooperation and blocking enforcement action; but this would be only after the Nations had agreed on, and individually ratified, a treaty or convention which set up the machinery and the rules for the international prohibition or control of the use of atomic energy in war.

No; we do not see in all of the foregoing the structure, attributes or powers which are characteristic of "government". The road-blocks in the path to "organized cooperation" of the Nations are thus far many, serious and profoundly disturbing. The times call for truly united American support of the United Nations as the House of Delegates has urged without discouragement or despair, and without dividing public opinion to chase will-o-the-wisps. The public's understanding of the crisis is not helped by confusions as to terms or by presupposing what does not exist. Analogies to the American form of government are especially inapplicable.

In any event, the vote of 50 to 12 in the Senate for the Connally amendment has made crystal-clear the policy predominant in that body, as to The United Nations in entirety and without exception as to the World Court. The questions discussed by Professor Preuss are receiving the thought of many lawyers. In our next issue, Senator Morse will state his views as to the effects of the amendment of his Resolution. Many American lawyers will continue to hope for, and to urge, a Declaration that will place the United States in its rightful position of leadership in support of the

Court, its jurisdiction, and the supremacy of law in the international sphere. When further progress has been made toward full and sincere cooperation among all of The United Nations, it should be practicable to remove the reservation from the Declaration filed by the United States.

Meanwhile, the sound and patriotic course for all our lawyers and people seems to us to be steadfast and united American support for "the United States first" rather than "Russia first", for the foreign policy of the United States as promulgated by Secretary Byrnes and the Connally-Vandenberg "team" instead of any political counsels of division, and for The United Nations as the existing and best means of the "organized international cooperation" to which our Association is pledged, instead of "any manner of super-government or super-state". It would be dangerous to "rock the boat" at this stage of an ebb tide, which will turn.

The Sections Can Help You

In furtherance of our policy of acquainting all members of the Association, especially the thousands of newcomers as well as the returned lawyer-veterans, with all phases of the Association's structure, work and personnel of leadership, our September issue contained: "Know Your House of Delegates". The make-up and workings of the House were described, and a complete roster of the names, addresses, and representative capacities, of the present House was given, so that our members could make known their views to their delegates.

Similarly, our present issue contains: "Know Your Sections in the Association". The scope, objectives, history, publications, current work, and prospective plans, of each Section are, for the first time in any one publication, brought together as a comprehensive picture and then given in detail, following a description of the status and functioning of the Sections and a roster of the officers and Council members.

A majority of the Sections are engaged in studies, surveys, analyses, compilations, in special fields. These eventuate in publications which are of substantial use to the members of the profession in their daily work for clients. For a practising lawyer to receive and read this useful material, in all of the fields of law in which he does or may practise, seems to us, from experience, to be as indispensable as it is for him to receive the commercial services "and the advance sheets", on which he so much depends.

Enlightened self-interest should lead members of the Association to join such Sections as will be of help to them. The same consideration should lead non-member lawyers to join the Association, and then the Sections in their fields of interest.

Other Sections are engaged, not so much in utilitarian work for the profession, as in the advancement of objectives which are important to the public and the profession. Lawyers who join these give their support to the accomplishment of vital ends.

All in all, the present story and picture of the Association's vital Sections should be read by every member. From month to month we shall follow up the present portrayal by giving the news of the interesting work and plans of the respective Sections.

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A Suggested "Court of Human Rights"

American lawyers will be interested in the implications of the proposal made at the Conference of Paris by Foreign Minister Herbert V. Evatt, of Australia, leader of the Labor Party and former member of the Supreme Court of his country (32 A.B.A.J. 425), for the creation of an impartial, international Court of Human Rights. Although he proposed to set up such an unprecedented tribunal as a part of the five peace treaties under discussion, rather than through an amendment of the Charter of The United Nations, his demand is likely to be renewed when the General Assembly meets and the implementation of the work of the Commission on Human Rights is under consideration.

The most startling innovation proposed by the militant jurist from "down under" is the creation of an international court to which appeals as of right could be taken, by individuals as well as Nations, from the decisions of National Courts, such as the Supreme Court of the United States, in matters affecting the observance and enforcement of what is referred to, without definition, as "citizenship, human rights and fundamental freedoms." The Australian proposal in this respect was stated as follows:

> To establish an impartial Court of Human Rights to enforce obligations created by the treaties regarding citizenship, human rights and fundamental freedoms. Subject to reasonable conditions this court could be invoked by the way of appeal from national courts or in special cases by direct approach.
>
> The right of invoking jurisdiction of this court should extend to individuals and to groups, as well as to States, and its judgments should be accepted under the treaty as enforceable not only against individuals or groups but against States and local agencies.

A second proposal by Mr. Evatt, no less controversial in the Conference of Paris, was "to extend the United States proposal to protect the fundamental rights of the people within any territory to be ceded by Italy, to all other territories ceded under the five treaties." The implications of this will appear from a reading of the United States proposal, as contained in Article XIII of the draft treaty with Italy. Dealing with nationality in the territories to be ceded to Yugoslavia and France, the United States asked that the following clause be added:

> The State to which the territory is transferred shall take all measures necessary to secure to all persons within the territory without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including the freedom of expression, of the press and publication, of religious worship, of political opinion and of public meeting.

The inclusion of such a clause in the peace treaties had been strongly urged on the Department of State by numerous American organizations, pending the development of a definitive international Bill of Rights. The American Bar Association did not join in these petitions, although it had advised that any attempted declarations as to the rights of individuals should be explicit, crystal-clear and within limits of practicality, so that it would be observed and enforceable within each member state. Mr. Evatt proposes that in respect of basic rights stated only in the most general phrases, individuals shall have an appeal to a new international Court, against a claimed denial of those rights by the Courts of the country of which they are citizens.

Support of the Australian proposal would seem to be directly contrary to the spirit and policy of the action voted by the United States Senate on August 3, in adopting decisively the Connally amendment of the Morse Resolution as to the World Court (32 A.B.A.J. 542). By that vote, the United States undertook to reserve unto itself the decision whether a dispute within another Nation involved a matter "essentially within the domestic jurisdiction" of the United States and so outside the scope of the jurisdiction of any organ or process of The United Nations. Indeed, it will seem to many lawyers to be regrettable that a proposal to create a court and confer a jurisdiction of at least doubtful character if undertaken under the Charter should have been broached as a part of the mechanics of the peace treaties.

The proposal gives rise to another question, which we submit for the opinion of our readers: Is it not premature and unwise to seek to create other and special courts for Nations and individuals, before the International Court of Justice is firmly established and generally accepted as the means of settling legal disputes between Nations? The present Court is designed to be "the principal judicial organ" of The United Nations. It should be and be kept the highest tribunal of international jurisdiction—the court of ultimate determination. The creation of new, coordinate or specialized courts, before the Nations have accustomed themselves to submission to the jurisdiction of the existing World Court, would seem to be a poor way to make progress toward the rule of law and impartial justice, in a world in which too many countries are still laggard and indifferent to adjudication and prefer to agitate their disputes at the political level.

Certainly we doubt if the Senate of the United States would ratify the creation of such a tribunal as Mr. Evatt has proposed, with an appellate jurisdiction to overturn decisions of the Supreme Court of the United States, on the appeal of any Nation or individual, in cases which are claimed to involve the matters which he vaguely indicates but does not define.

The Committee on the Judiciary

President Willis Smith has appointed the Association's new Special Committee on the Judiciary, the creation of which was voted by the House of Delegates on July 3 (32 A.B.A.J. 401). Its ten members are:

3rd Circuit...John G. Buchanan, *Chairman,* Union Trust Building, Pittsburgh 19, Pennsylvania

1st Circuit...J. N. Welch, 60 State Street, Boston 9, Massachusetts

2nd Circuit...Jackson A. Dykman, 177 Montague Street, Brooklyn, New York

4th Circuit...Douglas McKay, Carolina Life Building, Columbia, South Carolina

5th Circuit...Francis H. Inge, Box 1109, Mobile 6, Alabama

6th Circuit...Jay P. Taggart, Marshall Building, Public Square, Cleveland 13, Ohio

7th Circuit...Richard Bentley, 209 South La Salle Street, Chicago, Illinois

8th Circuit...Roy E. Willy, Security National Bank Building, Sioux Falls, South Dakota

9th Circuit...Loyd Wright, 111 West 7th Street, Los Angeles 14, California

10th Circuit...A. W. Trice, American Building, Ada, Oklahoma

The powers and duties of the Committee were stated in the Resolutions adopted by the House (32 A.B.A.J. 401). The new Committee is regarded as one of the most important in the history of the Association.

Various proposals and communications, by members of the Association, as to matters within the Committee's province, have already been referred to it, along with the general Resolutions, offered by individual members of the House which were referred to it by the Resolutions creating the Committee.

Among Our Contributors

JACK FOSTER, editor of the *Rocky Mountain News*, of Denver, Colorado, whose address at the Tenth Circuit Conference was a moving and constructive delineation of a trained layman's outlook on judges, jurors, lawyers and the humane qualities of justice, has had a long career in newspaper work, mostly on the staff of the Scripps-Howard Press, and has reported many famous trials. He was born in St. Joseph, Missouri, in 1906, attended Western Reserve University and has worked on the Cleveland *Press* and New York *World-Telegram*. He has been an editor in Denver since 1940. His keen understanding of human relationships has enabled him to develop a trenchant literary style and a gift of vivid statement.

JACK FOSTER

CHARLES WILLIAM BRIGGS, of St. Paul, Minnesota, who writes so forcefully in reply to some of Ben W. Palmer's strictures, is a lawyer in active general practice, and has been for five years a member of the House of Delegates. He was born in Cairo, Iowa, in 1887, was admitted to the Iowa Bar in 1912 and to the Minnesota Bar in 1919. He was graduated in 1909 from the University of Iowa and in 1913 from the Harvard Law School. He practiced law first at Wapello, Louisa County, Iowa, where he was prosecuting attorney until the outbreak of World War I. He resigned office and served in the United States Army for two years and three months. He spent a year in France as a Captain of Infantry in the 88th Division. In August of 1919, he resumed the practice of law in St. Paul, with the firm of Clapp & Macartney. With it and successor firms he has continued in general practice of the law. He has been active in the Minnesota State Bar Association, as head of its Committee on Integration of the Bar. He has been keenly interested in government, both as to domestic policies and the international problems. For many years he has been an active member of the Minnesota Committee of the American Bar Association's Special Committee on Improving the Administration of Justice, and has been a strong protagonist of the exercise of judicial control over practice and procedure through the promulgation of rules patterned on the Federal Civil Code of Practice and Procedure.

CHARLES W. BRIGGS

The spirited exchange of views between Charles W. Briggs and BEN W. PALMER, both of Minnesota, deals with deep fundamentals of the law, in a lively and realistic manner. PALMER is a lawyer in active litigation practice in Minnesota, and is also a lecturer and writer of note on legal and historical subjects. Details of his career were published in our September issue (page 605). Judging from the communications received, his articles in the JOURNAL have stirred a great deal of interest, and have led to a great deal of thinking, by lawyers throughout the United States. Mr. Briggs makes a challenging reply in this issue, and Mr. Palmer closes for the affirmative.

BEN W. PALMER

FREDERIC M. MILLER, who is Chairman of a Committee in the Section of International Law which produced the Report and Resolutions on "world government limited" that will be considered by the Section and the House of Delegates on October 28, has been a member of the Supreme Court of Iowa since 1939 and at times has acted as its Chief Justice; but on September 12, he resigned from the Court, effective September 30, to become the head of a new law firm in Des Moines. He was born in 1896 in Des Moines and he has lived there ever since. Because he served overseas as a 2nd Lieutenant in the 1st and 15th Cavalry, AEF, during 1917-19, his B.A. degree at Grinnell College, Iowa, in 1921 was as of 1918. He won his J.D. degree at the State University of Iowa in 1922, after having been admitted to the Bar in 1921. He was practising in Des Moines, at the head of his firm, when he was elected to the Supreme Court of Iowa. He has been State Delegate from Iowa and an active member of the House of Delegates since 1941, and since 1944 has been a member and Vice Chairman of the Committee on Proposals for International Organization for Peace and Law, in behalf of which he has addressed many State and local Bar Associa-

FREDERIC M. MILLER

tions, particularly as to the World Court. During the San Francisco Conference of The United Nations, he was the consultant for the Veterans of Foreign Wars, which cooperated closely with the American Bar Association. At the age of fifty, it is said in Iowa that the future of this rugged and scholarly lawyer, in public office or the practice of law, will depend on his own choice.

FRANK E. HOLMAN, who vigorously opposes in this issue the idea of "world government now", has been active in the practice of law in Seattle, Washington, and the Pacific Northwest since 1924. He was born in Sandy Hill, Utah, in 1886 and was graduated from the University of Utah in 1908. He was one of the first Rhodes Scholars, under the will of Cecil Rhodes of South Africa, to go to Oxford University in England, from America; he won his B. A. in Jurisprudence in 1911 and his M. A. in 1914. He was admitted to the Bar of the State of Washington in 1911, and practiced first in Seattle. Returning to Utah, he practiced law in Salt Lake City in 1912-13, was an instructor in law at the University of Utah in 1913-14 and Dean of Law during 1914-15. He went back into the practice of his profession in 1915; in 1924, he moved again to Seattle where he has headed the firm of Holman, Sprague and Allen. He was President of the Seattle Bar Association in 1941 and President of the Washington State Bar Association last year; he has been a member of the House of Delegates of the American Bar Association since 1942. Since 1944 he has been a member of the Committee on Proposals for International Organization. He is a life member of the Oxford Union (England), and has spoken and written extensively and earnestly on public questions.

FRANK E. HOLMAN

His article on *"Forms of Government"* was in 32 A.B.A.J. 190. A chief characteristic of his writing has been said to be his propensity for supporting factually each statement he makes.

ROBERT A. LEFLAR, who reviews in this issue *Cases and Materials on Judicial Administration* and submits some interesting observations on the education and training of lawyers for the present-day world, is the Dean of the Law School of the University of Arkansas, at Fayetteville, in that State. He was born in Siloam Springs, Arkansas in 1901, and was graduated from the University of Arkansas in 1922 and from the Harvard Law School in 1927. He was admitted to the Bar of Arkansas in 1928. He has been in consultant law practice from 1928 to 1942. He taught law at the University of Arkansas, commencing in 1927, and has been professor of law at the University of Kansas, the University of Missouri and research fellow at Harvard Law School from 1931-1932. He became the Dean of Law at Arkansas in 1943. During World War II he was an active member of the War Relocation Authority and the Regional War Labor Board of his native State.

ROBERT A. LEFLAR

LAWRENCE PREUSS, who contributes to this issue an exposition of some of the questions arising because of the Connally amendment of the Morse Resolution (S. 196) as to the World Court, is an Associate Professor of Political Science at the University of Michigan. His experience as to international law and the World Court entitles him to write. He was in the Division of Political Studies, in the Department of State, in 1942-43; was head of the Legal Branch of its Division of International Security and Organization, in 1943; was in the Division of International Organization Affairs in 1944-45; and was Associate Chief Adviser to the United States Representative at The United Nations War Crimes Commission (London), from November of 1943 to May of 1944. He was a Technical Expert at the Dumbarton Oaks Conversations in Washington in 1944 and a Technical Expert of the United States Delegation at the San Francisco Conference. In April of 1945 he was the Principal Secretary of The United Nations Conference of Jurists in Washington. His A.B. degree was from the University of Michigan. He studied extensively abroad, has written for American and European journals and was a Research Assistant at the Harvard Law School in 1929-33.

LAWRENCE PREUSS

SAMUEL MICON writes for this issue a thoughtful and earnest appeal against the unauthorized practice of law. MICON was born in Russia in 1880, came to this country ten years later, entered the Chicago-Kent College of Law in 1900, was admitted to the Bar in 1905, and has been engaged in the general practice of law in Chicago since that time. He is a member of the Chicago, Illinois State and American Bar Associations, and the American Judicature Society. He has recently published in the *Chicago-Kent Law Review*, March, 1946, an article entitled "Constitutional and Other Limitations on Administrative Agencies in Illinois", a field in which he is recognized as a qualified writer and speaker.

SAMUEL MICON

Bar Association News

Bar Association of Arkansas

Increased attention is being paid to the methods of judicial selection, bases of tenure, etc., in the respective States by their Bar Associations. At the last annual meeting of the Bar Association of Arkansas, Lamar Williamson, its former President, proposed virtually a complete reorganization of the State judiciary. His plan followed substantially the plan developed by the American Judicature Society. A resolution was adopted which authorized the President of the Association to appoint a Commission on Court Reorganization, to be made up of one judge and one lawyer from each of the seven congressional districts of the State, with Max B. Reid, the new President, as chairman of the Commission.

At the Commission's first meeting in Little Rock on August 2, those present were in unanimous agreement that the judicial system of the State needed a substantial overhauling. A thorough study of the subject has been begun by the group, with a hope that definitive recommendations can be submitted to the Association's meeting in 1947.

The Colorado Bar Association

Substantially the same problems are under active consideration also by the Colorado Bar Association. At its last annual meeting, its Board of Governors authorized the creation of a committee to make an exhaustive study of the State judicial system of Colorado. Philip S. Van Cise of Denver is the chairman. A complete analysis of the State judicial system is under way. Recommendations will be reported to the State Bar Association, and that body will in turn submit its proposals to the Legislature. Objectives are the betterment of the administrative handling of judicial work, the trial of cases and especially the limitations now placed upon the different courts as to their respective jurisdictions.

Maine State Bar Association

Two matters of general interest to the profession and the public are being considered by the Maine State Bar Association. One is the suggestion as to malpractice insurance, following the receipt of advertising matter lately being distributed to many Maine lawyers. As few lawyers in Maine carry such insurance, it is the present view of officers of the Association that it may be something to recommend to its members. Herbert E. Locke, Secretary-Treasurer, has proposed that, as in the medical profession, an insurer could well grant a lower rate to lawyers who are members of the State Association.

A second matter under consideration is as to fees. The Association is considering recommending to its constituent county associations an increase in the schedule of standard fees. At the present, the minimum Bar rate for the making of a deed is generally $3 in Maine. Many say that this does not even pay "overhead".

New Jersey State Bar Association

The New Jersey State Bar Association is dealing actively with one of the problems confronting its lawyers. Efforts are being put forth to be of practical assistance to the lawyer-veterans of that State. Through the many phases of this effort, the Association is trying to place those who wish positions with firms, assisting others in finding new locations where a desire for a change is expressed, cooperating with county bar associations in running refresher courses as long as they are needed and endeavoring to secure judicial references to help out and tide over the lawyer-veterans wherever that is practicable.

The State Bar of California

The legal profession of California has completed twelve volumes and is at work on six other volumes of the annotated restatement of the laws in cooperation with the American Law Institute.

The annotation of the restatement of the laws is one of the long range projects of the State Bar, and is being conducted by a committee composed of O. K. Cushing, chairman, San Francisco; Edwin D. Dickinson, Berkeley; Thomas A. J. Dockweiler, Los Angeles; John J. Goldberg, San Francisco; William G. Hale, Los Angeles, and A. T. Shine, Oakland.

The Committee reports that the Director of the American Law Institute states that the sale of the Restatement of the Laws to returning

E. T. KNUDSON, PRESIDENT
IDAHO STATE BAR BOARD OF COMMISSIONERS

lawer-veterans makes the annotations, especially in larger states like California, increasingly important.

Georgia Bar Association

The Bar Association of this State has been moving forward rapidly in effecting many needed reforms in the practice of law. In 1945 the Association, with the cooperation of Governor Ellis Arnall, took upon itself a most ambitious program to revise and revamp the laws of Georgia as to certain needed reforms. Under this program, at the last session of the Legislature the following bills were passed: A bill to authorize the Superior Courts to render declaratory judgments; a bill creating a Judicial Council; a bill authorizing the Supreme Court of Georgia to revise the rules of procedure and pleading and practice in civil cases in the lower courts and the rules of practice and procedure for appeal or review in all cases, civil and criminal, in the appellate courts; a bill changing the manner of granting divorces.

At the last meeting of the Board of Governors, it was decided that a fall meeting of the Association should be held, probably in Atlanta during October or November, for the purpose of presenting to the Bar of the State the changes made, particularly in the divorce law and in court procedure. The new rules of procedure are to become effective on January 1, 1947, and there are many drastic changes which have the effect of materially speeding up the trial of cases in the lower courts and of simplifying the methods of appeal and review in the appellate courts. The law on divorce is already in operation, the most important change being a procedure by which the court will grant divorces without the intervention of a jury in uncontested cases.

The Association is sponsoring two important bills to be presented to the next session of the Legislature in January, 1947, with strong hopes of passing them. One is an entire change in the probate law and procedure, and the other will establish a new trust law.

BENNETT H. PERRY, PRESIDENT
NORTH CAROLINA STATE BAR

ROBERT B. TROUTMAN, PRESIDENT
GEORGIA BAR ASSOCIATION

North Carolina State Bar

In the past year, the North Carolina State Bar has cooperated with the North Carolina State Bar Association in conducting refresher courses for the returned lawyer-veterans. These courses have been in the form of Institutes put on at the University of North Carolina under the auspices of the Institute of Government.

Mr. Albert Coates, Director of the Institute of Government at Chapel Hill, and a staff of lawyers, teachers and judges have joined with each other in this important work.

The Annual Meeting of the North Carolina State Bar will be held on October 25, in Raleigh, with Bennett H. Perry presiding.

Delaware State Bar Association

During the past two years under the leadership of President William Prickett, the Delaware State Bar Association has carried on two main activities. The first is in relation to practice and procedure in the Delaware Courts. Delaware is one of the few States that still adheres to common law pleading. A special Committee headed by President Prickett has been working steadily for several months on an improved and modern procedure to be used by the Superior Court, which is the Trial Court in that State. The final report of the committee has not yet been published. When it is, it will be taken before the Association for approval and then recommended to the judges who have the sole power to adopt the new procedure. President Prickett and his committee are attempting to simplify the pleading and pre-trial procedure as much as possible and are adopting some material from the new Federal Rules of Civil Procedure.

The second matter is the adoption of a legal aid procedure which is now in operation. Three or four months ago, after a report as to the needs of such, the Association formed a charitable corporation known as the Delaware Legal Aid Society. It has an office in the Public Building in Wilmington with a lawyer who is paid by the Association, and with a secretary and stenographer. All applications are thoroughly examined and are either refused, referred to the proper agency or society or represented by the Legal Aid Society. There is a special Executive

Committee of the Society to which the lawyer in charge of the office may refer any questions and to which any applicant who has been refused aid by the lawyer may apply for consideration of his case. The Society has not been in effect long enough at the present time to know definitely of the complete results. However, within a matter of three or four months a fairly good idea of its activities and of its values to the community should evolve.

Virginia State Bar

Among the many activities at the Annual Meeting of the Virginia State Bar, held on August 23, at Portsmouth, Virginia, the Bar took the following action:

Adopted a resolution directing the President to appoint a Committee to study the matter of an Administrative Officer for the Courts in Virginia; also, a resolution that all depositions in divorce cases be taken before a Commissioner in Chancery.

Adopted a resolution recommending to the Congress that the Jennings Bill be passed; continued the Committee on the Study of Revision of Procedure in Virginia.

Adopted a resolution of the Committee on Legislation that the Code of Virginia be revised and re-codified; that the decimal system be used in numbering the Code.

State Senator Macon Melville Long, St. Paul, Virginia, who served as Vice-President for the past year, was elected President for the year beginning September 1, 1946. Senator Long served as one of the original committee of forty, selected to draft the Rules for the integration of the Virginia State Bar in 1938, and has represented the Thirty-third Judicial Circuit of Virginia on the Council ever since.

Thomas H. Willcox was elected Vice-President. Mr. Willcox is a member of the Norfolk Bar and has served as a member of the Executive Committee for three years.

R. E. Booker was re-elected by the Council as Secretary-Treasurer for the coming year.

MACON M. LONG, PRESIDENT
VIRGINIA STATE BAR

Oklahoma Bar Association

A Minimum Fee Schedule, which became effective September 1, 1946, has recently been approved by the Oklahoma Bar Association. The report (*Oklahoma Bar Journal*—Vol. 17, No. 31, page 1253) of the Committee on Fees has been raising a considerable amount of interest on the part of all lawyers and contains much food for thought on this issue.

The Oklahoma Bar Association has recently created an "Oklahoma Bar Foundation" which will acquire funds for the purpose of building the Oklahoma Bar Association a home and the same will be located in Oklahoma City. This Foundation will also sponsor other projects after the accomplishment of this first one.

The Oklahoma Bar Association now has several groups of lawyers in leading towns in Oklahoma working on Title Examination Standards. The first group of these Standards will be submitted to the Central Committee of the Oklahoma Bar Association for adoption within the next sixty days.

During the months of February to July the Oklahoma Bar Association sponsored numerous Veterans Refresher Courses, and they have been successfully concluded. Many letters and resolutions have been received extolling the merits of these courses.

State Bar Association of Connecticut

At the Executive Committee meeting of the State Bar Association of Connecticut on August 29, it was voted to send the *Connecticut Bar Journal* to all Connecticut lawyer-veterans of World War II, beginning with the October, 1946, issue, without charge; also that lawyer-veteran members are granted remission of dues for the year beginning October 1, 1946; and that membership be made available to every lawyer-veteran non-member of the Association with omission of admission fee and dues for one year, upon application for membership, dispensing with the need of proposers and seconders.

The speakers at the annual dinner, to be held on October 14, 1946, will be Senator Brian McMahon, who will speak on "The Atomic Bomb and the Law", and the Honorable Carroll C. Hincks, Judge of the United States District Court of Connecticut, who will discuss the "Federal Administrative Procedure Act of 1946".

Tri-County Bar Association

A project that may be of interest and value to other associations, is being conducted by the Tri-County Bar Association in Wisconsin. The Association, comprising the Counties of Columbia, Adams and Marquette, is putting on a series of fifty-two broadcasts over station WIBU on subjects that are of general interest and value to the listening public. The talks are non-technical in nature, but are strictly confined to the legal field. The time is bought, and the talks are sponsored by the two local banks, who also pay for the weekly ads that are run on each speech in advance of the program.

Bigger Dues for Bigger Duty by Bar Associations

By Lane Summers

OF THE WASHINGTON STATE BAR*

In our lives the tempo of change has quickened. Change is now rapid. And change is affecting visibly and violently races, nations and civilizations, as related to one another and as related to their constituents. In the flow of change, our own people and our own profession cannot possibly swim to some shore and watch the swift waters in safety. As individuals, singly and alone, we must be swept along with the stream, unless as a group, breasting together the current of change, we can control its course—for one fact is presently patent, that group opinion promoted into group action is the social power in our country.

Because of our specialization as lawyers, we have little knowledge and no responsibility as to the changes in agriculture or manufacture, in transportation or communication, or in many other classifications of endeavor. But for changes in laws, their enactment, interpretation and administration, for changes in the constitutional structure, and for changes in the philosophy of government, we have large knowledge and the greatest responsibility. Here, with all the faults of experts, we *are* experts. Here we have the priceless privilege and also the dire duty of leadership.

But are we fully paying for our privilege by fully performing our duty? The answer is "no", because while we are worrying separately, we are not working collectively. As professional individuals we are milling around in the mob, so that as a professional unit we are not marching ahead of the line.

Fortunately the Bar of the State of Washington is already integrated. To exert the lawyers' leadership in our State and to exemplify the lawyers' leadership in other States, our Association must have more than mere organization; it must also have more money—much more money. In this conviction some weeks ago, I appealed to the Board of Governors to increase membership dues. Perhaps in similar conviction, the Board has assigned me to ask for your approval.

A current editorial by Glenn R. Winters, in the *Journal of the American Judicature Society*, reflects that others believe Bar dues generally are set in idling neutral and should be shifted into gear forward. His article, prompted by a report tabulating Bar dues over the country, includes the following comments:

> "The outstanding disclosure is the generally low level of State Bar Association dues. The District of Columbia at $18 and Alabama at $15 are highest; Montana and Wisconsin at $3 and Texas at $4, are lowest. More than half of the rest are $5. . . . Those familiar with the potentialities for organized Bar activities will recognize this as a deplorable situation. . . . It is time that the lawyers of America faced squarely the issue of whether or not they are sincere enough in their ideals of public and professional service to provide the means . . . to translate (their) dreams into constructive action. If they are satisfied with the part-time efforts of volunteers who must sacrifice personal time and interests to carry forward the work of the organized Bar, then they should rest content with what they have and not complain because Bar Associations, already extended far beyond their resources, are not doing more than they are at present". (Vol. 29, No. 6, April issue)

As you all know, our dues have been $6 per year. With a membership of some 2500 lawyers, the Board of Governors has been limited to about $15,000 annually, with which to meet the expenses of our Association. Upon the increase to $8 per year authorized in recent months and effective in January, the Treasurer should collect approximately $20,000 for 1947. But even this sum is small coin with which to chart a constructive course of lawyers' leadership.

In my opinion it was a regrettable error to permit our State Bar statute to provide a $10 limit upon the dues which could be required of members. While I admit timidity about advancing the present time as appropriate to attempt amendment to the statute by removal of the restriction, I do say that at the earliest expedient date the rate of our dues should be made to rest solely in the discretion of ourselves to the exclusion of the Legislature. Now you can approve an increase to the $10 limit. Some day you should double or treble that amount.

[Mr. Summers then outlined a specific program of several items which he urged his State Bar should undertake.]

In conclusion, to swing support for my suggestions I cite to you a leading article in the August issue of the AMERICAN BAR ASSOCIATION JOURNAL (pages 453-457), by the Honorable Tom C. Clark, Attorney General of the United States, warning against the attacks and methods of Communists and Facists in our midst, and appealing to the lawyers of the country.

[Mr. Summers then quoted in full the Attorney General's remarks on pages 456-57 of our August issue.]

As final support of my appeal for aggressive aim and action by us attorneys, I quote Professor Wigmore at the end of his great treatise entitled *Panorama of the World's Legal Systems*, where he says:

> "In short, the rise and *perpetuation* of a legal system is dependent on the development and *survival* of a highly trained professional class." (page 1129)

So, in asking directly for more money, I plead indirectly for the cause of our profession, our legal system, and our country.

*Editors Note: Mr. Summers spoke at the Annual Meeting of the Washington State Bar at Spokane on August 31. The meeting voted to increase the Association's dues to the statutory limit of $10.

Lawyers *in the News*

● Before the end of October, the booming voice and crisp rulings of the doughty Belgian lawyer who is the President of the General Assembly of The United Nations may become known to radio listeners throughout the land, as do the tones of the chairman of one of our national political conventions, every four years. His utterances will also be widely read by our people, because that is the American way.

PAUL-HENRI SPAAK

The General Assembly is still slated to begin on October 23 its twice postponed but still fateful deliberations in the great auditorium on the Flushing Meadows, once the site of the gay and colorful "World of Tomorrow"—the New York World's Fair, where the representatives of the Nations played at carnival while elemental forces were gathering for global strife.

The personality and career of PAUL-HENRI SPAAK were portrayed in this department at the time of his election as President (32 A.B.A.J. 210) through votes marshalled by the United Kingdom, with the United States and Russia in the negative because of their support of Trygve Lie.

Those of us who last saw this Belgian lawyer as an agile figure on the courts of international tennis will honor him for a courageous and notable career in his profession and in public service. As President of the General Assembly he has shown himself to be no mere moderator, but a bold factor in policy-making as well as one of the most eloquent men in The United Nations.

He will come to America doubtless more than a little weary, not only from the travails of the troublous conference of Paris, where he has represented Belgium as its Foreign Minister, but also from political vicissitudes under the parliamentary system in his own country, where the voters have deprived "the parties of the Left" of a sufficient working majority and he has had to report inability to form a coalition cabinet of secure tenure for his premiership. His own continuance as Foreign Minister has not been challenged, but his mandate comes now from a government and an electorate who have disavowed the extreme measures of "the Left".

American lawyers of all parties and philosophies renew their hearty welcome to their distinguished colleague from oft-invaded Belgium, to which the struggle for peace and security is a grim effort for life itself.

● A gifted lawyer who was continually in the public prints during the summer is DEAN ACHESON, Under Secretary of State, who is the Acting Secretary of State when James F. Byrnes is out of the country, as he usually has to be. With the fast-moving foreign policy of the United States being decided by telephone between the White House and Paris, London, Lake Success or the Connally-Vandenberg team—in fact, almost anywhere except in the State Department where the "spade work" is done—the role of "pinch hitter" for Byrnes requires "big league" talent, especially when a crisis like that with Tito and Yugoslavia sweeps in with the August heat.

DEAN ACHESON

ACHESON is an anomaly—a first-class lawyer who loves the practice of law but leaves himself little chance to work at it, a good deal of a diplomat and statesman who has spent most of his recent years in office as "understudy" for some one else, a strong-willed public servant who does not hesitate to disagree emphatically with anyone, even the White House, yet finds himself "drafted" to return or stay on when he thinks he has "burned his bridges" and can go back to his flourishing law firm. He has been a member of the American Bar Association since 1932.

He was born 53 years ago in Connecticut, where his father was the Episcopal Bishop. His mother was the daughter of a wealthy Canadian brewer, and he has spent much time in Canada—in fact, his appearance and manner remind of a British or Canadian diplomat or barrister. He went to Groton, then was graduated from Yale in 1915 and from Harvard Law School in 1918, after serving a while in the Navy. He came to Washington as secretary to the late Mr. Justice Brandeis and stayed on for twelve years in association with the law firm of Covington, Burling and Rublee, where he made a great deal of money and an excellent reputation as a trial lawyer. He could then afford to take public office.

In the Spring of 1933, he became President Roosevelt's first Under Secretary of the Treasury; but that lasted only six months. He thought the "gold-purchase" plan of the Treasury to raise commodity prices was unconstitutional, and he said so. While Secretary Woodin was ill and away, ACHESON was let go, without even a "Dear Dean" epistle. Henry Morgenthau, Jr., was put in charge, and ACHESON went back to his law practice and to public advocacy of measures in aid of Britain.

When Robert H. Jackson was Attorney-General, ACHESON was named as Chairman of the Com-

mittee on the Administrative Agencies. That was a good fight; ACHESON presided well, but the Committee was split wide open; the decisions to "hold the line" for the agencies, against the American Bar Association minority, were being made elsewhere. He went along with the majority; but in the McCarran-Sumners Administrative Procedure Act this year, the Congress and President Truman went far beyond the minority report, in measures to curb abuses.

In 1941 ACHESON came back in as Assistant Secretary of State, in which capacity he had charge, at least for the record, of one important activity after another. He became weary and resentful of responsibility without authority for his own personnel or policies. So he resigned and left town, and tried to stick to it. Telephone messages and a presidential plane finally brought him back to Washington, this time as Under Secretary of State, on August 17 a year ago. He has a capacity for plain speaking, gets along well with diplomats and "on the Hill", and does not hesitate to let his own views be known; e.g. the Acheson-Lillienthal report on atomic energy bears his name and he had a lot to do with it, but it has been reported that he did not like the stand taken for modification of the "veto power" in connection with it, and now he appears to have little to do with the Baruch disposals which have bogged down in The United Nations.

● This item will give information of the lawyer most lately admitted to the elect or select circles of the championship Forest Hills Tennis Club, on Long Island, and is already a heralded contestant who looms large on its famed courts where international matches are decided.

TRYGVE LIE

The newcomer is TRYGVE LIE, the herculean Secretary-General of The United Nations, who is no mean adversary with the racquets. "He is pretty fair—at tennis," said his proponent for membership. After protracted sessions such as the Security Council has been holding lately at Lake Success, this Norwegian lawyer can perhaps be forgiven for hitting the ball hard. As he weighs "too many over two hundred pounds" and is built and moves like the titanic "Doc" Blanchard of West Point football fame, his "forehand" and his base-line coverage are something to watch—and watch out for. He "gets around", on the tennis courts as well as in the capitals of Europe.

When Paul-Henri Spaak, Belgian lawyer who is President of the General Assembly, gets to America, lively matches of an international flavor may be expected. Spaak formerly figured in international tennis. It has been reported that the King of Sweden may challenge the winner.

● One of the Senate's most distinguished authorities on the law of the Constitution is JOSIAH WILLIAM BAILEY, of North Carolina, whose independence of action has reflected his high ideals of public service.

JOSIAH WILLIAM BAILEY

Born in Warrenton, North Carolina, in 1873, he was graduated from Wake College (N.C.) in 1893. He studied law under S. F. Mordecai, but also attended Trinity College (now Duke University) and Wake Forest Law School in 1907-08. He had been the editor of the *Biblical Recorder* from the time of his graduation from college until the completion of his law studies.

Admitted to the Bar of North Carolina in 1908, BAILEY began practice in Raleigh. First he served as the United States Collector of Revenue for North Carolina and as a member of his State Constitutional Convention in 1913-14. He was first elected to the Senate in 1931, and has been re-elected twice, his third term to expire in 1949. He has been Chairman of the Committee on Air Commerce since 1938, and was a delegate to the International Aviation Conference in Chicago in 1944.

From the first, he has commanded respect in the Senate for his mastery of the principles of constitutional government; and his independence has commended him to his constituents and his country, although not always to the National leaders of his party.

● JOHN FOSTER DULLES, member of the American Bar Association since 1930, member of the United States Delegation in the San Francisco Conference and in London and New York meetings of the General Assembly of the United Nations, was chairman of the International Conference on World Order convened by the Protestant and Eastern Orthodox Churches in London in August, and has since been named as the Vice Chairman of a new thirty-member commission created by the churches as a means of making their voice and influence felt in world affairs.

JOHN FOSTER DULLES

DULLES has had an active career in law and international affairs. Born in Washington, D. C., in 1888, he was valedictorian of his class at Princeton in 1908, studied for two years at the Sorbonne in Paris, and took his law degree at George Washington University in 1911. He was Secretary of The Hague Peace Conference in 1907 and went to Central America in 1917 as a special agent of the Department of State. During World War I, he served as a Captain and a Major.

He was counsel to the American Commission to Negotiate Peace in

1918-19, a member of the Reparations Commission and the Supreme Economic Council in 1919, legal adviser on the Polish plan of financial stabilization in 1927, and an American representative at the Berlin debt conference in 1933.

Meanwhile, he has practised law, as a member of the firm of Sullivan and Cromwell, and is a Vice President of the Association of the Bar in the City of New York. In 1944 and since, he has been the chief adviser of Governor Thomas E. Dewey on international affairs. During the Dumbarton Oaks Conference and afterwards, he worked closely with Secretary of State Cordell Hull in behalf of a bi-partisan policy as to foreign affairs. He is the author of *War, Peace and Change,* and writes and speaks extensively on international relations. Late in August, he was mentioned prominently for the nomination of his party for United States Senator from New York this fall, but he announced that he was "unavailable".

At the London Conference of the representatives of churches, DULLES urged that each Nation should do what it can to help "ease world tension", and that the United States could help by abandoning "the idea of far-flung bases which threaten others". He advised an ending of what he saw as "an armaments race" between the East and West, and a beginning of a reduction in armaments. "An atomic development authority such as was advocated by the United States is the only practical way to go forward on this," he said.

"Russia thinks of an atomic authority as a Trojan horse to get behind the iron curtain and impair her defense, and there is some reason historically for this view. However, on the basis of my contacts with American political leaders I am sure the United States is entirely honorable in its atom proposals. The plan for international control could be extended so that armaments more and more would be brought under control.

● Canada's noted orator, LEONARD W. BROCKINGTON, K. C., who has charmed and thrilled American Bar Association audiences with his pleas for the unity of Anglo-Saxon peoples in war and peace, was in the front-page news in Canada and some parts of the United States late in August, when his efforts as Special Conciliator for the Dominion Government failed to end the economy-crippling strike of Canadian steel workers (USWA-CIO). Since the war's end brought to a close his globe-circling trips by plane as "the Voice of the Empire," BROCKINGTON has been practising law as a member of the Gowling firm in Ottawa, and acting as arbitrator and conciliator in the labor disputes which have lately invaded Canada from the United States.

LEONARD W. BROCKINGTON

The CIO leaders had demanded a general wage-increase of fifteen and one-half cents per hour and had brought Canada's steel industry to a standstill to enforce the demand. Some of the steel companies made a factual showing that they could grant no further increases at all, at least without further increases in the prices for their products; one company offered eight cents and another ten cents, if prices were increased. Still fighting a rear-guard action against the spread of inflation from the States, the Dominion's Labor Minister, its Prices Board Chairman, and its House of Commons Committee on Industrial Relations, tried to "hold the line" against any substantial increase for the strikers. On his own responsibility, BROCKINGTON offered ten cents in an effort to end the strike, but made it clear that this was not a factual determination or a Government proposal. The CIO leaders turned it down, and attacked the Dominion government bitterly.

Although BROCKINGTON has been devoting himself assiduously to his law practice and the work for which he was drafted in labor controversies, he crossed the border on June 28 to greet his American brethren at the summer meeting of the New York State Bar Association at Saranac Lake and gave his appraisal of the post-war problems confronting Canada and England, and perhaps inferentially the United States. His first address in the United States was at the 1936 meeting of the American Bar Association in Boston (61 A.B.A. Rep. 522). This won for him an international reputation, and led to his signal services to Canada and Britain during the dark days of World War II. His last appearance before the Association was at the 1944 Annual Meeting in Chicago (31 A.B.A.J. 116-120, 161-163).

● RAYMOND HILDEBRAND, of Glendive, Montana, member of the American Bar Association since 1930, organized and administered the Fields Administration Branch of the Office of Dependency Benefits, United States Army, through which it is reported that more than $15,000,000 was saved to taxpayers through the discontinuance of family allowances affected by the investigations.

RAYMOND HILDEBRAND

HILDEBRAND was born at Lyle, Minnesota, on April 29, 1891. He received his LL.B. degree from Georgetown University in 1916. He has practised law in Glendive since 1916, and was County Attorney of Dawson County from 1922 to 1926. As Colonel in the Army, his duties arose from the fact that the War Department, through the Office of Dependency Benefits, administered the payment of family allowances to dependents of Army servicemen, under the provisions of the Servicemen's Dependents' Allowance Act. As the Officer in Charge of the Field Investigations Branch, he supervised the investigation of more than 400,000 family allowances, to ascertain

the existence of fraud or dependency. The investigations were conducted by a staff of commissioned officers, working out of eleven regional offices situated in various cities, with one in Puerto Rico.

Evidence adduced by the investigations formed a basis for criminal prosecutions in the military and civil courts and for the discontinuance of improper family allowances. More than seventy commissioned officers were specially trained in investigating methods. Augmented by forty civilian attorneys and two hundred employees, they carried on the investigations.

● Federal Judge JOHN C. COLLETT is back in Washington and is grappling again with stabilization and reconversion controversies. He returned with President Truman when the latter came back from the Missouri primaries. In our May issue this department announced that he had resumed his judicial duties, after serving as Director of Economic Stabilization (32 A.B.A.J. 279). There is an impression in Washington that this Missouri member of the American Bar Association since 1931 will figure in future news.

JOHN C. COLLETT

In mid-August, there was reorganization again of the Office of War Mobilization and Reconversion. COLLETT was brought back to act as "over-all associate" of Director John R. Steelman. This time he insisted that he receive no title of any kind, and he has been given none—thus far. Mr. Steelman said that COLLETT would continue in his new administrative job "as long as he can remain away from his judicial post" in Jefferson City.

At the age of 48, this former Keytesville lawyer has had a good deal of a career, because executives who have a hard job to do like to "borrow" him and have him around. He had been prosecuting attorney of Charlton County, counsel to the State Highway Department, and Chairman of the Missouri Public Service Commission, before President Roosevelt appointed him to the Federal bench in 1937. In 1945 he left his judicial work to plunge into the midst of the controversies as to postwar wage and price policies, and now he is back in the same turmoil. He seems to be still going places, aside from travelling between Missouri and Washington.

● GERARD D. REILLY, of Massachusetts, member of the National Labor Relations Board since August of 1941, member of the American Bar Association since 1939, has attracted Nationwide attention in connection with his retirement from the Board. His outspoken declarations upon his being relieved of official responsibility, have been vigorously commended or criticized, according to the point of view or interests of the person commenting.

GERARD D. REILLY

REILLY has had a long career on the side of organized labor. Born in Boston in 1906, he was graduated from Harvard College in 1927 and from the Law School in 1933. Meanwhile, he had been State House correspondent for Rhode Island newspapers in 1927-29, and night "copy" editor for the Boston *Traveller* in 1929-30. He practised law in Boston until 1934, and then became reviewing attorney for the Home Owner's Loan Corporation.

In July of 1934, he was appointed as an attorney for the United States Department of Labor, and as its Assistant Solicitor the following year. After serving for a few months as Administrator of its Public Contracts Division, he became the Solicitor for the Department early in 1937. Four years later, President Roosevelt appointed him a member of the NLRB, where his independent course at times left him in the minority, notably as to the unionization of foremen and supervisory representatives of management.

In leaving the NLRB, REILLY issued a controversial statement of his views based on his long experience. He recommended two changes in the NLRB's rules and rulings, which he thought the Board should make, and four desirable changes in the Wagner Act, which would require action by the Congress and approval by The President. "The Wagner Act is basically sound labor policy." he said. Acceptance of collective bargaining has become general throughout American industry, during the ten years, he declared. "So far as the 'blue-ribbon' industries are concerned, violations of the Act are more technical and accidental than deliberate." He added that he thought there is still some resistance, especially in the South and Middle West. The elimination of secondary boycotts and of strikes for representation or for illegal objectives should be enacted, he thought, to make the Act more fair and effective.

REILLY urged that the NLRB should amend its rules to give to employers the right, coordinate with that of a union, to petition for bargaining elections where a union claims bargaining rights and threatens to strike without resorting to NLRB procedure. He would curtail the strike rights of a union if it did not go to the Board. Under present rules, an employer can petition only if two or more unions are contesting for representation.

His second recommendation was that the NLRB should accord to employers the right, co-relative with that of the unions, to speak freely during union-organizing campaigns, the only condition being that employers do not intimidate or discharge employees engaging in union activity. Although the Constitution reads so as to assure freedom of speech to all persons, the NLRB has construed this as a very limited right of such persons as are employers, and the Supreme Court has not yet gone far in abrogating this limitation of the Constitution by NLRB legisla-

tion. The Board itself has shown vestiges of greater liberality, but a lawyer still cannot safely advise an employer that he can speak his mind without great risk of charges, litigation and harassment.

Self-constituted champions of free speech for "radicals" have been strangely silent as to the Board's infringements. Not so REILLY now.

"I think an employer should have the right to speak pretty freely to his employees about the long-term effect of unionization of his plants co-relative with the right of the union to say anything it pleases," he said.

REILLY counselled against a Federal mediation board as too cumbersome a method for handling labor disputes, and he advised against compulsory arbitration. His four recommendations for changes in the Wagner Act were:

1. That the Congress should forbid the certification of foremen and other supervisory employees as bargaining units. This action has been assumed by some Federal administrative agencies, particularly for the benefit of John L. Lewis. He declared that it is not a right granted under the Wagner Act, and was not discussed when the Act was pending.

2. That unions striking for objectives contrary to the Wagner Act should be denied protection accorded under the Act, notably reinstatement and "back pay". REILLY admitted that this would be no deterrent to the most powerful unions, which he listed as the United Mine Workers, AFL building trade unions, and the railway brotherhoods. Practically all others would be deterred, he said.

3. As secondary boycotts cannot be dealt with under present labor legislation, the NLRB should be given the power to prevent one union from refusing to handle goods or products from a plant whose workers are represented by opposing organizations. The CIO and AFL were said by REILLY to engage frequently in disputes of this nature, such as the refusal recently of the Teamsters Union, AFL, and the Longshoremen and Warehousemen, CIO, to unload AFL-manned ships at Coos Bay, Oregon. In most such cases the management, although complying with its labor contract in full, is helpless, he said.

4. That the prosecuting and enforcement functions of the NLRB be transferred to the Department of Labor. This step, he said, would leave the board as a fact-finding and judicial body only, and increase public confidence in the impartiality of its performance of its functions.

A Great Jurist Met a Tragic Death

● It seems appropriate to record in this column an event which, unnoticed by many at the time, has occasioned a deep regret and sense of loss among the lawyers and statesmen of all lands. On July 3, 1945, a few days after the adjournment of the San Francisco Conference, SIR WILLIAM MALKIN, who had been legal adviser to the United Kingdom delegation at the Conference, left Montreal, Canada, for England, on a converted Liberator bomber operated by the Royal Air Force Transport Command. When the plane was about 300 miles east from Newfoundland, the radio contact with the plane was suddenly interrupted. Despite prolonged search no trace of the plane and its distinguished occupants has been found.

SIR (HERBERT) WILLIAM MALKIN, son of H. C. Malkin of Corrybrough, Inverness-shire, was born on April 17, 1883. He was educated at Charterhouse and at Trinity College, Cambridge. He was called to the Bar in 1907 by the Inner Temple, of which he became a Bencher in 1941. He entered the Foreign Office in 1911. He was appointed Assistant Legal Adviser in 1914, and Second Legal Adviser in 1925. When Sir Cecil Hurst was elected judge of the Permanent Court of International Justice in 1929, Sir William succeeded him as the Senior Legal Adviser of the British Foreign Office. He could have retired in 1943, but decided to stay on until the end of World War II.

Since his early days in the Foreign Office, Sir William was keenly interested in international conferences. His first major assignments were the American-British Pecuniary Claim Tribunal under the agreement of August 18, 1910, and the Conference of 1914 on the internationalization of Spitzbergen. During World War I he dealt mainly with neutrality and prize cases. As a member of the British delegation to the Paris Peace Conference of 1919, he took an important part in the work of the Drafting Committee which was responsible for the final text of the treaties of peace. He also took part in the Washington Naval Conference of 1922 and in the Lausanne Conference on Turkey in 1923. He was an ardent supporter of the League of Nations and attended nearly all of the meetings of the Assembly of the League. With equal zeal he embraced the idea of The United Nations, and contributed to its development at Dumbarton Oaks and San Francisco. His friendship was valued by many American lawyers, who came to have an admiration for his fairness and skills.

His services to the Crown were rewarded by a string of honors. He was made a C.M.G. in 1918 and a C.B. in 1923; was advanced to K.C.M.G. in 1930; became a K.C. in 1931; and was advanced to G.C.M.G. in 1937.

Sir William combined a clear, logical mind with a tremendous store of legal knowledge. He avoided the limelight, and preferred a small committee room to a rostrum of a big conference. He was well known for his objectivity and detachment. He was a master of succinct analysis, and his memoranda were famed for their brevity and clarity.

The deep waters of the Atlantic have taken from humanity a very noble man, an outstanding civil servant, a leading internationalist, and an eminent lawyer. The lawyers of America join with Lady Malkin and with the lawyers of the British Commonwealth in their deep sorrow.

The Case of Unauthorized Practice of Law

by Samuel Micon

OF THE ILLINOIS BAR

The problem of unauthorized practice of law by laymen has confronted the law profession for many years, but not on such a large scale as it does the present day. Many lawyers are now experiencing competition in many fields of law practice with lay practitioners notwithstanding the fact that some effort has been made by some local Bar Associations, or committees of lawyers, to suppress it. Many lawyers now realize that the unauthorized practice of law by non-lawyers has considerably expanded since State and Federal administrative agencies by legislative authority, or by rule, permit lay persons to appear before them in a representative capacity and participate in activities which constitute the practice of law.

Powers of Administrative Agencies

Upon examination of the Federal and State statutes and decisions, it will be observed that not only do the administrative agencies have the power to promulgate rules of procedure, but have also a discretion in particular activities which closely approximate the function performed by courts. Under that discretion they authorize lay practitioners to appear in a representative capacity and perform functions which properly belong to lawyers.

However, in the States where the rule making power of the agencies has been tested, the courts of last resort have held that the rule making power of the agencies is not to be regarded as general in any scope but is limited to the making of rules necessary to the performance of the duties imposed upon them by the legislative body, and that such rules must consequently relate to procedural matters only, and will not allow them to extend the operation of the statute by rules which properly belong to the judicial department (*Chicago Kent Law Review*—No. 2, Vol. 24, March, 1946, pages 150-151).

Practice of Law Defined

What constitutes the practice of law has been defined in nearly all of the States as one who advises others as to their legal rights, the method to be pursued and the practice to be followed for the enforcement of such rights, or one who appears in a representative capacity in a matter or proceeding before any commissioner, referee, board body, committee or commission constituted by law, or authorized to settle controversies and there, in such proceeding, performs any act or acts for purposes of obtaining or defending the rights of the party he represents.

Practice of Law—A Judicial Function

The courts have observed that the practice of law is a judicial function and that the judicial department is necessarily the sole arbiter of what constitutes the practice of law and to determine the qualifications of the practitioners. The power being judicial in its nature, the Constitution under the separation of powers prohibits its exercise by legislative or administrative branches. But the decisions of the State courts do not work effectively because the Federal statutes under which the Federal agencies function in the several States, exercise authority by rule to permit lay persons to represent third parties and perform functions which clearly constitute the practice of law directly contrary to State decisions.

Suppress Illegal Practice Effectively

Much breath is being wasted and much ink spilled in the diagnosis as to who is wrong in the scheme of things and what is to be done to effectively suppress the illegal practice, but it all boils down to the distressing fact that the lawyers are split into groups under various associations and societies, each doing as they like, and lawyers in the same group are also not unanimous in the desire to abate the lay practice.

For example, just about the time when the opportunity presented itself for the submission and the possible passage of a bill in Congress with the amendments proposed by Thomas J. Boodel, Chairman of the Committee on Unauthorized Practice of Law of the Chicago Bar Association, deleting the objectionable language contained in Section 6 (a) in the bill known as the McCarran-Sumners bill respecting "Appearance" in Federal administration procedure (Report of Committee on Unauthorized Practice, Chicago Bar Association, 1945) which would have restricted the illegal practice of law by

laymen, it was directly opposed by the Committee on Administrative Law of the Chicago Bar Association (Report of Administrative Law Committee, Chicago Bar Association, 1945) and although the original bill with the objectionable language in Section 6 (a) was sponsored by the American Bar Association and its Committee on Administrative Law, David F. Maxwell, Chairman of the Standing Committee on Unauthorized Practice of the Law, of the American Bar Association, also indicated his Committee's objection and promptly submitted for consideration by the Committee on Administrative Law, of the American Bar Association an amendment to Section 6 (a) clearly stating his reasons for the proposed amendment, and added that Section 6 (a), as presently worded, if passed will freeze into Federal administrative agency procedure the practice of law by laymen (Report of the Standing Committee on Unauthorized Practice of Law, of the American Bar Association—December, 1945).

Administrative Procedure Act Becomes Law

The amendments failed to receive the solid support of the Bar. As a result the Federal "Administrative Procedure Act" was passed and became law June 11, 1946, without the amendments. As it now stands, Section 6 (a) of the Act authorizes parties to have advice or representation of counsel or, to the extent that agencies lawfully permit, representation by non-lawyers 32 A.B.A.J. 382).

The Act as passed makes no distinction between procedures before Federal administrative agencies which constitute the practice of law and in which only lawyers should appear, and those which do not, where either lawyers or laymen can appear to assist in ministerial duties of the agencies.

As a final analysis the problem of unauthorized practice of law generally, and more particularly in administrative agency procedure, is placed deeper into debatable ground and confusion. There is no doubt that legislatures, both Federal and State, may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare so long as they do not encroach upon the powers belonging to the courts.

The Debatable Question

The debatable question is: Can Congress under the separation of powers legislate who shall practice law; or authorize Federal administrative agencies to decide the qualifications of persons who are to participate in activities before them in phases which constitute the practice of law as defined by the State courts and who have said it is a judicial question and not a legislative one? It has been said in *Kilbourn* v. *Thompson,* 103 U. S. 168, (1881), the legislature is not to interfere with the other coordinated departments of the government except where an intermingling of sphere of action is authorized or contemplated by the Constitution itself.

Goldsmith Case Is Not Decisive

It is doubtful whether the issues presented in the case of *Goldsmith* v. *U. S. Tax Appeals,* 270 U. S. 117, 123, is decisive of the question of whether a layman can be permitted to perform functions before Federal administrative agencies which constitute the practice of law. I believe, upon proper interpretation, it does not. It is well to note the language used by the Supreme Court of Illinois *In re Day,* 181 Illinois 83, 97. I quote: "To say who can practice law is the province of the judicial power. The fact that a power has been exercised by the legislative branch without serious question, does not necessarily mean that the Constitution interpreted properly conveys such power. Action of legislatures in this field with at least tacit approval of the courts, such action does not in itself however determine the nature of the power. The court can strike down as unconstitutional the usurping judicial power of any statute encroaching upon the judicial power." The United States Supreme Court may or may not agree with the quoted language used by the Supreme Court of Illinois but it is worth trying.

Views To Be Considered

I am strongly of the opinion that a special committee representing all groups or associations of lawyers should meet in conference with a view (1) of making research and to test the constitutionality of the right of Congress to legislate and give discretionary powers to Federal administrative agencies to permit laymen to practice law. That in the event the United States Supreme Court should decide this question in the affirmative, then (2) to consider the advisability of proposing an amendment to the Federal Administrative Procedure Act or by a new act to require Federal agencies to follow the law of the State wherein they function with respect to the restriction of the practice of law by laymen in agency proceedings; and (3) to consider views and experiences of the Bar with reference to unauthorized practice of the law in other fields and to determine the process to be followed in abating the same. It would be in the interest of the public and uphold the dignity of the profession if lay practice would be definitely and permanently suppressed.

THE LAYMAN AND THE COURTS

(Continued from page 624)

above all who need the warm, encircling arm of law—and for them, and their rights as free-born citizens, the law primarily should be concerned.

Fortunately judicial evolution has been in this direction during recent years—certainly during the last quarter century. Over and over again the Supreme Court has ruled that human rights are far more important than property rights, and this point of view has spread through a great part of the federal judiciary.

Rights of Persons Accused Are Protected

The Supreme Court, as a spokesman for American justice, time and again has concurred with the late Mr. Justice Brandeis in his eloquent expression of faith that:

"The door of the court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as the most virtuous fellow citizen; no record of crime, no matter how long, makes one an outlaw."

Whenever there has been evidence that tortuous third-degree methods have been employed, the Supreme Court has on most occasions ruled in behalf of the accused, even though he might be guilty. "The wrack and torture chamber may not be substituted for the witness stand." This was the view of the late Chief Justice Hughes. And in *McNabb* v. *U. S.*, you gentlemen will remember that the third degree was called by the Supreme Court for what it is: "An easy but self-defeating way in which brutality is substituted for brains as an instrument of crime detection."

No, says the Supreme Court—the Wisconsin policeman who beat a confession out of a man, the Michigan officer who hung a skeleton in a room to obtain a confession, the Florida authorities who chained a defendant overnight in a mosquito-infested cell and questioned him the next day with the scalp of a dead woman at his feet—no, these shall not rule the land, declares our highest tribunal.

Furthermore, in searching for other examples of the defense of human rights, I was amazed to find that the Supreme Court of the United States during one war year issued 125 writs of certiorari, calling for review of convictions of a relatively small band of people known as Jehovah's Witnesses. These cases sprang, as you gentlemen know, for the most part out of police courts and involved only small fines. Yet the Supreme Court, which denied to review matters involving millions of dollars in property, felt that the human rights of the individual must be defended at any cost.

A Humane Court Our Only Fortress

Why am I citing these instances in a speech presumably about the relation between the layman and the courts? I am citing them as an affirmation of my belief that a humane court is the only fortress we've really got in the everlasting struggle of mankind to maintain, as Justice Brandeis said, "the right to be let alone." A humane court, therefore, is the only true relation that does exist between the people and the law.

Goodness knows, it is regrettable that personal differences among certain members have shaken the belief of some people in the integrity and authority of the Supreme Court. Yet leaving all personalities aside, and looking only at the record, this high tribunal of ours has established in recent years examples of the application of principles of freedom for the individual for which, in my opinion, we shall be eternally grateful.

"A Good Deal of Rubbish" Comes Into the Courts

As this conversation with you comes to an end, let's look at a recent case involving that strange and curious cult, "The Great I Am". The leader of "The Great I Am" came into the Supreme Court with a conviction for having accepted money for allegedly fraudulent revelations. But said Mr. Justice Jackson:

"The wrong of these, as I see it, is not in the money the victims part with half so much as the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."

A "good deal of rubbish" comes into your courts, I am certain—much of it in the form of objectionable human beings. I am sure that most of you wish that it had been cast aside somewhere along the way before it got to you. And yet sometimes I think that the dignity and human splendor of the law depends to a great extent on how the court disposes of its "rubbish". For it is through the handling of such cases that the court has the opportunity once again to state the human principles on which true law flourishes and in the restatement of these principles the judge is brought closer to the layman, the layman closer to the judge.

And that is as it should be. For the layman and the judge are in reality the same—they are free people seeking, by tolerance and humanity and wisdom, to keep the law a true guide to fruitful lives during the few years God has allotted us all.

KNOW YOUR SECTIONS

(Continued from page 659)

Sylvester C. Smith, Jr., 18 Bank Street, Newark 1, New Jersey

For term ending 1948...Dwight Campbell, Milwaukee Station Building, Aberdeen, South Dakota

Herbert W. Clark, 1110 Crocker Building, San Francisco 4, California

For term ending 1949...Richard Bentley, 209 South La Salle Street, Chicago 4, Illinois

Will Shafroth, Administrative Office of the U. S. Courts, Supreme Court Building, Washington 13, D. C.

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Vacancy

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Henry F. Long, State House, Boston 33, Massachusetts

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Stephen B. Robinson, Box 3639 Terminal Annex, Los Angeles 54, California

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Ralph R. Reed, American Security Building, Washington 5, D. C.
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Lawrence E. Green, 60 State Street, Boston 9, Massachusetts
For term ending 1949....Dana Latham, Title Guarantee Building, Los Angeles 13, California
William A. McSwain, 38 South Dearborn Street, Chicago 3, Illinois

Section of Administrative Law

The organization of this new Section, with a statement of its highly interesting helpful work and plans under the leadership of Chairman Carl McFarland, was given in our August issue, and so is not repeated here. The indications are strongly that the sessions, the studies and the publications, of this Section will rank high among the invaluable aids which the Association makes available to the average lawyer.

Section of Labor Relations Law

This Section, the most recently created, is meant as a meeting-place and conference forum for all lawyers who are interested in the complex and vital law of labor relations. It is felt that their meeting, acquaintance, discussions, some bases of accord and team-work for better industrial relations in the United States may be developed, under the aegis of the Association and in the interests of the public.

Constructive recommendations will be formulated and submitted if there is agreement. The Section is not in the interests of either employers or labor organizations.

So it is hoped that attorneys customarily representing labor unions of all types, attorneys customarily representing employers, and attorneys who are members of or counsel for Federal or State regulatory bodies in this field of law, will join with all public minded members of the Association who are interested in this field and the development of a remedial body of law in it, will come into the Section, and will take an active part in its work. Any lawyers of the foregoing categories who are not already members of the Association may be proposed for membership and then join the Section.

The presence and participation of lawyers who come from the general membership of the Association and are not identified principally with clients in this field of law, are essential to the work of this Section.

The Resolutions adopted by the House of Delegates last December were as follows:

> RESOLVED, that a Section be established within the American Bar Association, the purpose of which shall be to study the Law of Labor Relations as a science, and to promote its fair and just administration; to study and report upon proposed and necessary legislation; to encourage members of the Association representing both Management and Labor throughout the Nation to, through said Section, meet and confer upon their various problems, and there to endeavor to define rules of conduct based upon the rights and responsibilities of Labor and Industry; and to, through such cooperation promote justice, human welfare and industrial peace and recognition of the supremacy of Law.

Many members of the Association have already made application and enrolled as members of the new Section. Its annual dues have been fixed at $3. Present members will elect officers for the first year. They have prepared a program for the first meeting of the Section in Atlantic City on October 29. Communications concerning the Section can be addressed to the Association, or to Clif Langsdale, Chairman of the Standing Committee on Labor, Employment and Social Security, at the Scarritt Building, Kansas City, Missouri.

The new Section will concern itself only with labor relations law; the Standing Committee will continue to fulfill its functions as to other matters within its jurisdiction since its creation in 1936 (By-laws: Article X, Section 10).

Section of Corporation, Banking and Mercantile Law

Prior to 1938, matters concerning business law were generally dealt with, in behalf of the Association, through its Standing Committee on Commercial Law and Bankruptcy. Even before 1938 it had become apparent that legal problems of country-wide interest to practising lawyers in that field were varied and numerous, and could well be made the subject of discussions and study in a Section. Those interested in the subject of business law undertook the organization of a Section on Commercial Law. Its first officers were Jacob M. Lashly, of St. Louis, Missouri, Chairman; G. Dexter Blount, of Denver, Colorado, Vice Chairman; and W. Leslie Miller, of Detroit, Michigan, Secretary. Its first Council consisted of Henry C. Schull, of Sioux City, Iowa; Sidney Teiser, of Portland, Oregon; Henry S. Drinker, of Philadelphia, Pennsylvania; John M. Niehaus, Jr., of Peoria, Illinois; J. Kemp Bartlett, Jr., of Baltimore, Maryland; Raymond G. Young, of Omaha, Nebraska; Robert A. B. Cook, of Boston, Massachusetts, and Hamilton Cross, of Jersey City, New Jersey. The formation of the Section was approved by the House of Delegates, and the Section replaced the Standing Committee on Commercial Law and Bankruptcy. Because of a still further diversification of matters advisably within its field, its name was changed in 1943.

The Section has grown from a membership of less than 500 to a present membership of approximately 5000. It is now the largest of the Association's Sections. It has been called the Association's "business-law" Section; it has greatly interested and helped the average lawyer in his business practice. At its organization it had four committees: Reorganization, Bankruptcy and Liquidations, Cooperation with Other Committees and Sections, and Membership. It now has twenty Committees—all active.

The Section's Proceedings for 1945 is contained in a printed pamphlet of some 150 pages, in double columns. This and the preceding Annuals are valuable repositories of interesting and useful expositions of subjects of moment in the field of business law. Already law schools and practitioners are asking for reprints of articles found in them.

An index of these articles will in time be prepared for the convenience of members of the Section.

This Section has lately embarked upon a project of publishing, for distribution to its members, a quarterly bulletin called *The Business Lawyer*. The first number was a sixteen-page pamphlet containing news of the activities of the Section. The second number will be published in October, and will bring to Section members the current affairs of the Section, as well as information of the program for the Section's annual meeting.

The Section contemplates a comprehensive and varied program for its Atlantic City sessions. In addition to the reports of its committees through the various chairmen, eleven addresses are scheduled, none to take more than twenty minutes, since it has been stipulated that if an address will take more than twenty minutes in delivery it shall be printed in full in the Proceedings of the Section and only a summary of it shall be given orally. Among those who are to speak at this meeting are: Colonel Joseph M. Hartfield, of New York; Professor John Hanna, of Columbia University; D. J. Needham, of Washington, D. C.; Charles P. Taft of Cincinnati; Frank C. Olive of Indianapolis; Ralph G. Boyd of Boston; John R. Nicholson of Chicago; J. Francis Ireton of Baltimore; Soia Mentschikoff of New York; Karl D. Loos of Washington, D. C., and Ben C. McCabe of Chicago. Sidney Teiser of Portland, Oregon, Chairman of the Section, will preside over the 1946 meeting.

On Tuesday evening, October 29, a dinner dance is scheduled for the members of the Section and their friends.

Probably the most important matter to be passed upon by the Section in Atlantic City is the wording of a proposed amendment to Section 60-(a) of the Bankruptcy Act. The decision of the Section to urge such an amendment was made at its last meeting. Detailed reasons for the amendment and its scope were set forth in the July issue of the Section's bulletin, *The Business Lawyer*.

The Junior Bar Conference

There was a time — not so long ago, although many men now active in the Association do not recall it — when the Association, its membership and its meetings, were made up almost wholly of elderly and middle-aged lawyers, who conducted its affairs and debated and decided its policies. Although there were then, as now, many thousands of American lawyers under the age of 36 years, very few of them attended the Association's meetings. They were not particularly welcomed or admitted to participation if they did come. Only a few hundred of them were members at all, for the sake of the honor and the right to receive the JOURNAL and other publications. The voice of the younger men of the Bar was unheard, and the Association's work and meetings provided no training-school for its future leaders, no means of acquainting the younger men with the traditions, the objectives and the ideals of their profession.

All that was changed twelve years ago. The first dynamic and far-reaching change in the structure and atmosphere of the Association and its meetings was the creation of the Junior Bar Conference, the enrolling of a large membership in the Association through it, enlisting of the enthusiasm and momentum of the younger men, the hearty welcoming of lawyers under 36 to a place and part in Association meetings and social functions, the providing of an organization through which they could work and promulgate their ideas about the Association and about the legal aspects of public questions and at the same time acquire a training, experience and acquaintance for later leadership as alumni of the Junior Bar Conference. In short, the lawyers under 36 years of age were made a part of *the Association team*, and they have been that, ever since.

The Junior Bar Conference, now twelve years old, was for several years the largest Section of the Association, and expects soon to regain that distinction. From its original membership of about 250 at its formation in 1934, it rose to a membership of more than 6,000 in 1941, and was still going strong, on the rise.

Then the outbreak of World War II changed the picture. This was the Section whose members were predominantly within the ages for answering the call of their country. More than 4,000 of them left their law offices and donned uniforms, to serve in all manner of capacities. It is known that at least fifty-four members of the Association made the supreme sacrifice and will never come back; in the nature of things, these were principally, but not exclusively, from the ranks of the Junior Bar Conference. Many of those serving in the Armed Forces dropped out of the Section; its membership inevitably lessened, for the time being.

This has led naturally to concentrating the year's efforts primarily on the task of bringing the lawyer-veterans back into active membership and participation in the Conference. To provide incentive, the Board of Governors sponsored a Junior Bar membership contest, the results of which are indicated by the facts that the Junior Bar Conference membership has already been raised to almost 5,000, that in July and August alone 1159 Association membership applications were obtained by contestants, and that the Junior Bar member who leads the field as this is written, W. Arlington Jones, of Hattiesburg, Mississippi, had himself obtained about 146 Association applications by August 31.

So the Junior Bar is devoting its principal efforts this year to revitalization and reorientation. Its first roster of members in over three years has been published; a special Activities Committee, headed by James D. Fellers, of Oklahoma City, Vice Chairman of the Conference, reviewed all work ever undertaken by the Conference and made its report

to the May meeting of the Executive Council; and the bi-monthly leaflet, *The Young Lawyer*, is completing its second successful year of publication under Editor Charles H. Burton, of Washington, D. C. Although a number of Conference activities, such as the 343 Procedural Reform Studies being made to assist the Special Committee on Improving the Administration of Justice, the Traffic Court Improvement work and Relations with Law Students work, are being carried forward with increased momentum since the close of the war, the strictly wartime activities are being brought to a close (for example, the lawyer-veteran placement and readjustment work), while other activities are being renewed or instituted. The Committee on Legislative Drafting is to be revived, and the Committee in Aid of the Small Litigant has begun to assist the Committee on Legal Aid in its program to make legal aid services available in as many as practicable of the larger American cities as well as some smaller communities.

For some years "Junior Bar Notes" have appeared regularly in the JOURNAL, to keep members informed of the current activities, not only of the Junior Bar Conference itself, but also of the approximately fifty local and State younger lawyers' groups which have become affiliated with it since 1934. These in practically all instances have been organized since the Conference was founded in that year. In the May issue of the JOURNAL (32 A.B.A.J. 305) there was given a brief history of the Conference, with a recording of some of its principal achievements to date.

The meeting of the Junior Bar Conference in Atlantic City on October 27 to 29, inclusive, is to be devoted largely to constructive self-criticism. Details of the planned program are elsewhere in this issue. The opening address will be by Arthur A. Ballantine, former Under Secretary of the Treasury. Joint meetings on October 29 with the Section of International and Comparative Law, at luncheon, and with the Section of Judicial Administration and the National Conference of Judicial Councils, at dinner, are scheduled. Past Presidents Arthur T. Vanderbilt, Jacob M. Lashly and George Maurice Morris will offer their ideas as to how the Conference may be improved, at a round-table discussion on "How Can the Junior Bar Conference Increase Its Usefulness?" President Seldon Waldo of the United States Junior Chamber of Commerce will lead a discussion, on the morning of October 27, on organization methods in State and local groups. At the second session of the Conference Former Judge Justin Miller, President of the National Association of Broadcasters, will discuss "Lawyers and Broadcasting in the Public Interest," in connection with a discussion designed to find ways of amplifying and improving the Public Information Program which has been responsible during the current year for an increasing number of regularly scheduled radio broadcasts in such widely separated places as New Hampshire, Arizona, Indiana, Washington, D. C., Seattle and Oklahoma City.

It is anticipated that before many months have passed, the Conference will have again the largest membership in its history and will comprise close to one-fifth of the total membership of the Association. Any lawyer under 36 becomes automatically a member of the Conference, on becoming a member of the Association. Meanwhile, the Conference is fulfilling to an increasing extent the hopes and purposes of its founders that the training, experience and acquaintance gained in its work will provide sound and seasoned future leadership for the Association. Many graduates of the Conference are already in important posts in the Association. The Secretary of the Association, Joseph D. Stecher, of Ohio, was one of the early Chairmen of the Conference. The Assistant Secretary, Ronald J. Foulis, of St. Louis, is also a former Chairman of the Conference. When conditions "shake down" after the lawyer-veterans have reoriented themselves to their law offices, their clients, and their communities, many of them who had fine experience in the Conference before World War II intervened will return to active work and increasing leadership in the Association.

Section of Real Property, Probate and Trust Law

This Section was designed as one which would be of especial help to the average lawyer in his practice. The formation of such a Section was discussed at the Washington meeting in 1932 and at the Grand Rapids meeting in 1933, following which a committee was appointed to organize a Section of Real Property Law. This special committee consisted of Messrs. Henry Upson Sims, Nathan William MacChesney, George E. Beers, William M. Crook and R. G. Patton.

These founders maintained an active interest in the subsequent work; most of them afterwards served as its Chairmen. By the time the Milwaukee meeting was held in 1934, the Section had been organized, with an initial enrollment of 1212 members. Following the Boston meeting in 1936, at which the present Constitution of the American Bar Association was adopted, the Section was reorganized as the Section of Real Property, Probate and Trust Law, with three separate divisions for these three subjects.

The Section has held notable meetings from year to year. The addresses of speakers together with the reports of the committees are published in annual proceedings of the Section. Considerable time and effort is devoted by working committees in the preparation of reports. The Section's committee reports and addresses have been in such demand that banks and other institutions in recent years have been distributing thousands of extra copies of them to practising attorneys. An address by Mayo A. Shattuck of Massachusetts on "The Prudent-man Rule of Trust Investments", delivered at the last Annual Meeting, was deemed

to be so important that copies were distributed to all members of the Section. The project on which the Section has been working for several years with the University of Michigan Law School was completed during this current year, in the compilation of the Model Probate Code. Copies of this Code have just been released to all of the members of the Section; it has been awaited in States in which changes in probate statutes are under consideration. The various committee reports and forms of documents prepared, such as the specimen Pension Trust Agreement prepared last year, are found by the members to be of substantial value to them. In order that the Section's material can be made more readily available to its members despite the sharp increases in printing costs, the Council has recommended that the Section dues be increased from its present figure of $1 to $2 a year. Section membership at the present time is slightly under 2000.

During World War II, it has been necessary to curtail the annual dinner of the Section. The attendance has necessarily been smaller at the meetings. From a questionnaire which has recently been distributed to the members of the Section, it seems likely that the attendance at the Atlantic City meeting through the week of October 28 will be back to normal. The officers of the Section are planning for three full sessions in addition to an annual dinner. Honorable Adolf A. Berle, Jr., former Assistant Secretary of State and Ambassador to Brazil, has accepted an invitation to speak at the dinner, on "Private Property in a Socialistic World".

Section of Insurance Law

Since its organization in 1933 this Section has published and distributed to its members volumes of discussions and authorities in this field of law. It is a "working Section".

Twelve standing committees (two special committees created this year) cover the following branches of Insurance Law: Automobile, Casualty, Fidelity and Surety, Fire, Health and Accident, Practice and Procedure, Life, Marine and Inland Marine, Regulation of Insurance Companies, Workmen's Compensation and Employers' Liability; special committees: Veterans' Affairs and Insurance Status. The Publications Committee correlates all of the publishing activities of the Section.

Since 1936, when the committee round-table programs were added to the general sessions of the Section, these committees covering the above branches of Insurance Law have produced papers, treatises and discussions on important topics within their respective fields. These papers by the members of the committees constitute a useful contribution to the records of the American Bar Association. They provide a current practical insurance service for the use of the general practitioner of the law in his daily work.

In addition to the annual round-table productions of the committees, several of them have prepared insurance policy annotations. The Automobile, Fire, and Health and Accident Committees have produced and distributed to the members of the Section annotations of the standard policy forms in these three branches of insurance. These Committees have been working on supplemental annotations which are ready for publication this year. The Workmen's Compensation and Employers' Liability Insurance Committee has been preparing a voluminous annotation work on Workmen's Compensation and Employers' Liability Insurance Law. Because of the wide-spread variation of the statutory requirements in this field the annotations have not been completed but their publication is anticipated within a few months.

As a result of the outstanding service rendered by this Section to its members, it has long been one of the largest dues-paying Sections of the Association. The Section's membership chairmen have played a vital part in creating this membership. In the final analysis, however, the gain is attributable to the service rendered the Section through its publications. The Section has attempted in a quiet but diligent manner to acquaint the lawyers interested in the law of insurance with the Section's service in aid of practising lawyers. The value placed on the service by the members of the Section has been its principal recommendation for new members. Details of the Section's Atlantic City program have been published by the Association.

Section of Mineral Law

This Section was formed at the 1926 Annual Meeting of the Association in Denver. It was an outgrowth of the desire of lawyers practising principally in the mineral law field to have the Association provide a forum through which the legal problems of the mineral industries could be discussed from the angles of public and professional interest, and some consensus made available to lawyers, through the exchange of experience and judgment. The problems of oil and gas conservation requiring the exercise of the police power of the States probably gave impetus to the organization of the Section. It was a Texas lawyer, Major John C. Townes of Houston, who was the principal force in creating the Mineral Section. While the membership has been predominantly from the oil and natural gas producing States, lawyers representing the coal industry and those concerned with the hard metals industry have taken an active interest in the Section, along with those whose approach is solely that of general practice and the public interest.

The Section functions ordinarily through three principal committees —one for the legal problems in each the coal, natural gas and oil industries. These committees survey the important legal developments affecting each industry during the year, and make a comprehensive report to the Section at its annual meeting. In this manner the current legal problems of the mineral industries are brought to the membership of the Section for informa-

tion and consideration. These reports are printed in the Section's annual pamphlet, which contains also the papers read at its meetings, on subjects of timely interest to lawyers in the field.

At the 1945 meeting the legal problems of natural gas and of Federal Power Commission regulation of that industry had an important place on the program. The expansion of natural gas pipe lines to the consuming areas of dense population in the North and East had become a matter of concern to many communities and to those in the competing fuel industries, and so to lawyers in those communities and industries. The proposed sale of the "Big Inch" and "Little Big Inch" pipe lines built by the Federal Government during the war has stimulated interest in even a larger segment of the Nation. Legal problems inherent in such matters are brought to the attention of Section members through discussion of the reports and papers.

At the coming meeting in Atlantic City, the Section is planning to devote a full day on subjects of interest to the profession. The committee on coal-law problems will sponsor a discussion which will include those incident to Government seizure of mines during labor disputes. Oscar L. Chapman, Under Secretary of the Interior, will discuss the newly enacted leasing laws covering the public domain. The Section members will have an opportunity to engage in a "question-and-answer" period on this subject, under the leadership of Peter Q. Nyce of Washington, D. C. Legal consequences of the recently completed natural-gas investigation by the Federal Power Commission will be the subject of a talk by Charles I. Francis of Houston, Texas.

Although this Section may be of primary interest to the lawyer whose practice takes him into the activities of the mineral industries, the Section has many features of interest to lawyers generally. Members receive in printed form the various reports and papers. A few years ago a volume which contained a number of articles on the history of oil and gas conservation laws was published for the Section members. A re-issue of that work has been authorized and will soon be under way. The Section dues are $2; members of the Association may send their applications, with a check for their dues, to the Association's Headquarters. The Section's membership, as of June 30, was 637.

Section of International and Comparative Law

This Section was organized as such in 1933. It is the successor to both the former Standing Committee on International Law and the former Bureau of Comparative Law. The Committee on International Law was one of the seven original Standing Committees of the Association. The Bureau of Comparative Law was organized in 1907. During the next seven years it published a bulletin which achieved a considerable circulation. This was absorbed in the JOURNAL of the Association upon the founding of the latter in 1914. In 1942 the importance and usefulness of the Section's reports and publications for its members led to the establishment of Section dues in their present amount of $2 a year. The public service character of the Section's work is still recognized in annual appropriations by the Association. The amount of these appropriations varies with the nature of the undertakings of the Section.

The Section now has 1050 members. Its Council includes a former President of the Association and five former Chairmen of the Section. Its thirty Committees include an Advisory Committee of which David A. Simmons, former President of the Association, is Chairman, and Committees on Cooperation with the Inter-American Bar Association; International Interchange of Jurists; Organization of an International Bar Association; United Nations Organization; International Law in the Courts of the United States; International Trade Regulation; International Transportation and Communications; Pacific Settlement of International Disputes; Progressive Development of International Law and Its Codification; Punishment of War Criminals; Treatment of Property Rights in the War Settlement; Freedom of the Press and Freedom of Speech; Comparative Jurisprudence, and the Teaching of International and Comparative Law.

A Special Meeting of the Section is customarily authorized and held in Washington during the Spring, in addition to the regular meeting in connection with the Annual Meeting of the Association. The Proceedings of the Annual Meetings are printed, with the reports of the Committees, and sent to all members of the Section, as well as to the libraries of the principal law schools throughout the country. Brief printed reports of action taken at the Spring meeting and of other developments of interest are mailed to members of the Section from time to time.

The Section affords to all members of the Association an opportunity to participate in the development of better understanding of the legal problems involved in the maintenance of orderly relations among the Nations of the world. It affords them also an opportunity to become acquainted with divergent concepts of private law in various countries and with the methods available for the reconciliation of conflicts between such concepts as applied in specific situations. International law now has practical importance to lawyers in inland cities as well as on the coasts. International aviation, international double taxation, international trade regulation, and numerous laws in the form of treaties or conventions, must now be considered by even the general practitioner. The laws of foreign countries which proceed upon assumptions radically different from those of American lawyers must frequently be taken into account, in the giving of advice to clients in this country. The Section welcomes

not only those who are already expert in its field, but also those who desire to be kept informed of developments within these fields. Members of the Association may send their applications for Section membership, with a check for $2.00 for their Section dues to the Association Headquarters.

The business scheduled for the meetings of the Section at Atlantic City includes action on two matters of great general interest to members of the Association. One of these arises from the resolution favoring world government which was proposed by Fyke Farmer of Tennessee at the Cincinnati meeting of the Association in December of 1945 (32 A.B.A.J. 171). Judge Frederic M. Miller, Chairman of the Section's Committee on United Nation's Organization, has had conferences with Mr. Farmer, and reports that the latter has indicated his satisfaction with the text of a Resolution which has been worked out on this subject by Judge Miller and members of his Committee. The other matter of great general interest to members of the Association is the plan of the Section to help bring about the organization of an International Bar Association. Pursuant to authority given by the House of Delegates at Chicago in July of this year, a meeting of representatives of national bar associations of the world has been called for October 8, 1946, in New York City, to consider a draft of a constitution for a federaion of such associations. A report of the action taken at that meeting will be given in Atlantic City by Robert N. Anderson, Chairman of the Section's Committee on the Organization of an International Bar Association.

Others who will present reports at the Atlantic City meeting of the Section include Judge Manley O. Hudson, Chairman of the Committee on the Progressive Development of International Law and Its Codification; Elisha Hanson, Chairman of the Committee on Freedom of the Press and Freedom of Speech; William A. Roberts, Chairman of the Committee on International Transportation and Communications; William Roy Vallance, Chairman of the Committee on International Interchange of Jurists, and Honorable Charles Fahy, Legal Adviser of the Department of State, who will speak on Tuesday morning, October 29, on "The American Lawyer in United States Occupied Germany".

Luncheon will be held by the Section jointly with the Junior Bar Conference on Tuesday, October 29. Senator Brien McMahon of Connecticut, Chairman of the Special Committee of the Senate on Atomic Energy, and Judge Robert N. Wilkin, of Ohio, whose address on "Three Pillars of Peace" is well known to members of the Association, have accepted invitations to speak at this luncheon.

The Section of Criminal Law

This Section will hold this month its twenty-sixth yearly meeting. Its first session was in 1921 in Cincinnati, about a year after its organization in August of 1920 at the 43rd Annual Meeting of the Association.

Distinguished lawyers have been associated with the Section, as its officers and members of its Council and as speakers at its sessions. Those who have served as its Chairmen include Ira Robinson, of West Virginia; Floyd E. Thompson, of Illinois; Oscar Hallam, of Minnesota; Justin Miller, of Washington, D. C.; Professor Rollin M. Perkins, of Iowa; Captain James J. Robinson, U.S. N.R., and Director of the Federal Bureau of Prisons James V. Bennett, present Secretary of the Section, who is acting as Chairman in the absence of Captain Robinson in Tokio.

The Section's most recent activity has been as to the Federal Rules of Criminal Procedure, which became effective March 21, 1946. The Section offered at the 1939 mid-year meeting of the House of Delegates a resolution, which was adopted, that the Association recommend that the Congress give to the Supreme Court authority to prescribe for the Courts of the United States rules of pleading, practice and procedure, to govern criminal cases. A bill was drawn by the Chairman and members of the Section and was introduced in both the House and the Senate.

A hearing before the House Committee on the Judiciary was sponsored by the Section, with the result that the bill became the Act of June 29, 1940 (54 Stat. 688). Wide discussion of the preliminary drafts of the rules, prepared by the Advisory Committee appointed by the Supreme Court of the United States, was then achieved through programs at several annual meetings of the Section and by other means.

Of retrospective interest is the fact that the program of the first meeting of the Section lists as subjects for papers and for discussion: "Reforms in Criminal Procedure", "Reforms in Criminal Legislation", and "Should Verdicts Be Unanimous in Criminal Cases?". During the years between 1921 and 1939 the programs of the Section were concerned with the discussion and study of various phases of the causes of crime, of the scope and purpose of the criminal law and of its appropriate administration. At its 1945 meeting the Section sponsored a timely discussion of the problems of military law. The broad purpose underlying the activities of the Section is well-stated in a report made in 1936 by its Council: ". . . the objective of the Section is rather to stimulate in the members of the Association as a whole an informed interest in the administration of criminal justice".

Estimate could hardly be made of the influence, throughout the United States, of the activities of the Section. In Indiana, the improvements during the 1930's in criminal procedure and the raising of the qualifications of the members of the State Police Force and the establishment of traffic courts were largely the outcome of ideas developed in this Section. California's new penal and correctional law and its youth correction program, as well as several important reorganizations in its judicial and penal system, show

the influence of the activities of the Section. Unquestionably, the Criminal Division of the Department of Justice, the Judge Advocates General of the Army and Navy, and the Prison Bureau, have also been influenced considerably by activities of the Section.

The Section has planned for the ensuing years an agenda dealing with at least eight phases of the legal problems in its field. All members of the Association are invited to become members of the Section and to take part. There are no dues.

The Section of Bar Activities

Historically, this Section may be regarded as an outgrowth of the Conference of Bar Association Delegates, which was formed in 1920 under the leadership of Elihu Root and others, to bring together annually the accredited representatives of State and local Bar Associations. For years the Conference was a somewhat anomalous appendage of the Association. Its delegate character made it more representative, in most ways, than the casual attendance at the Association's Annual Meetings, yet it could not decide policies or speak for the Association. Nevertheless, it fulfilled a need, and furnished the "yeast" for a good deal of uprisings as to the structure and policies of the Association.

When the Association was reorganized on a representative basis in 1936, the State and larger local Bar Associations were given the right to choose their delegates to sit and vote in the House. The new body, however, had to debate and act as to calendared matters; a discussion center for the exchange of views and experiences between the workers in Bar Associations could not be provided by the House. Means of ascertaining and expressing the views of the unrepresented local Associations were needed.

The Section of Bar Organization Activities was accordingly provided for in the new Constitution, in 1936. A change to the present name was adopted in 1943.

Today this Section is concluding its current year with three contributions to the Atlantic City program. On Sunday, October 27, the Conference of Association Secretaries, sponsored by the Section, will hold its annual luncheon and meeting for Bar Association secretaries, with Leland M. Cummings, chairman of the Conference, presiding. Section Chairman Charles B. Stephens will preside at the Section's annual meeting on Tuesday, October 29. The annual Awards of Merit for outstanding State and local Bar Association activities will be announced and presented by Charles O. Rundall, for the Section, at a subsequent session of the Assembly.

The Section's annual meeting offers a program of especial interest to State and local Bar Association officers. The morning session will be devoted to discussion of coordination of organized Bar activities on a national scale, to take full advantage of the leadership and guidance provided by the Association's committees and Sections. The afternoon will feature panel discussion of techniques in organized Bar activities related to lawyer-veterans, younger member participation, the selection of judges, Bar Association financing, and public relations programs. *The Bar Executive* has been revived as a monthly news letter for Section members. This Section imposes no dues, and any interested member of the Association is invited to join the Section.

The Section of Bar Activities is the principal agency within the Association which acts continuously as liaison between it and the State and local Bar Associations in strengthening organized Bar activities throughout the country. It is concerned primarily with practical problems of organized Bar planning and administration. As a clearing house for exchange of this information, the Section is developing as a valuable adjunct to the Committees and Sections of the Association, and is believed to be rendering a service that is beneficial to the many organizations within the profession of law.

Section of Public Utility Law

With some 800 members, this is one of the older Sections of the Association, having been created in 1917, under the leadership of the late Nathaniel T. Guerney, of the New York Bar. It deals with the interests of the public and the profession in all phases of public utility law, including that relating to railroads, air lines, electric and gas utilities, local transit utilities, water carriers, motor carriers, etc. Attorneys for corporate clients, members of and attorneys for regulatory bodies and municipalities and members of the profession generally, are members of the Section and have served as its Chairmen and Council members. Although the Section publishes special studies on various subjects from time to time, its principal publication is a survey prepared each year to review and digest the important developments and the decisions by courts and administrative bodies in the field of public utility law. This useful report is sent to all members of the Section as well as to law libraries, administrative agencies, etc. For many years the Section sponsored a dinner dance (without speeches) which socially was one of the "high-lights" of the Annual Meeting of the Association. During the war, this was suspended but it will be resumed at the October meeting. Present plans are to hold the function in the "22" Club in the Ambassador Hotel on Tuesday night of convention week.

At the Section meeting, Donald R. Richberg, of Washington, D. C., will speak on "Labor Disputes and Public Utilities", which will be of interest to lawyers whether or not they represent public utilities. Oswald Ryan, of Indiana and the Civil Aeronautics Board, will discuss "Public Utility Problems in the Aviation Industry"; and Elmer Smith, of the Chicago Bar, will talk on the lively subject: "The Application of Anti-Trust Laws to Regulated Industries."

At each session of the Section,

round-table discussions follow the stated program, so that those present may have the benefit of each other's experience in dealing with the legal problems in the field. The Section confines itself to studies and discussions, and has not undertaken to draft, adopt and submit recommendations for the House of Delegates, as to legislation or other matters in its field. Other details of the events for the three sessions are in the usual programs issued by the Association.

The Section extends a cordial welcome to all interested lawyers to join in its work. The Section dues of $2 per year entitle the members to receive all of the Section's publications.

Section of Legal Education and Admissions to the Bar

This Section was formed in 1893, and is the veteran of many hard-fought battles, over the years, in behalf of the profession and the public. Disruptions in the normal processes of legal education caused by the War have given the Section lately a busy time.

World War II brought to the American scene many pressures for relaxations which, if yielded to, would have meant a loss in the gains in the standards of legal education wrought out through twenty years of hard work which brought the recommendations of the Association into effect in all but five States. Engendered by the natural and laudable impulse to compensate in some measure the lawyer-veteran for his personal sacrifices in the service of his country, pressures developed from numerous sources to lower admission requirements in the law schools and at the Bar, to keep the schools alive by waiving standards, and to permit completion of legal training in less than the maximum time prescribed. The Section has stood firm for fundamentals. Recognizing the practical necessity and justice of some of these claims temporary relaxations were authorized in well-grounded cases.

The results to date have been on the whole gratifying. A survey of the situation indicates that little ground was really lost. Actually there seems to have come out of the experience a deeper appreciation of the work of the Section and a widespread undercurrent of desire that even higher standards be not long delayed. All law schools have been notified that the Association will expect full compliance with the approved standards, at and after the opening of 1946 fall terms.

The problems created, for the profession and for many communities, by the rapid return of nearly 40,000 lawyer-veterans seem to have been met in most instances intelligently, promptly and effectively. Through the agencies of the Practising Law Institute and numerous State and local Bar Associations with the law schools, the Section has helped to make practical refresher courses available to every returning soldier and sailor. The success of this program has pointed the way to a probable expansion of the activities of the Section into a direction of post-admission education on a larger scale and a recognition of correspondence courses for practising lawyers as a means of carrying such a continuation of law studies into the offices of members of the Association.

For the most part, the problem of admissions to the Bar has been handled by the State Boards of Bar Examiners and the highest courts of law of the various State jurisdictions; but the State representatives of the Section have been instrumental, in many instances, in helping to see to it that justice was done to individual veterans without too much violence to the standards. The Section is now engaged in a study of the extent to which admission standards have been relaxed for the servicemen. Out of this may come recommendations as to future policy. Committees are also at work on the problems of uniform admission requirements for all Federal Courts and a uniform rule or recommendation as to comity between States where members of the Bar of one State apply for admission in another.

The tremendous impetus given to law school enrollments by the GI Bill of Rights has brought the total number of law students from the low figure in the fall of 1945, of 4,803, to the present numbers which may reach or exceed 20,000 in the fall term of 1946. The Section has made an active effort to help secure competent instructors for the schools, and has announced that all law schools which were closed during the War or are undergoing a substantial reorganization as a result of the War, will be inspected soon after the opening of the fall term of 1946, in an effort to be sure that the approved standards have not been lowered.

By far the most important project entrusted to the Section at the moment is the proposed comprehensive study of the legal profession and legal education, which was approved by the House of Delegates on July 2. This task will take several years. Out of it may come some of the most important advances in legal education and in the structure of the profession itself, that have been achieved in the whole history of the American Bar.

The National Conference of Commissioners on Uniform State Laws

This body whose service to the public and the profession has long been so distinguished, occupies in various respects the status of a Section operating under the aegis of the Association, and so is properly included here. In other respects its quasi-official and public status differentiate it markedly from the Sections.

The National Conference of Commisioners on Uniform State Laws, now in its 56th year, was organized as the result of the adoption of a resolution emanating from a special committee of the Association,

which recommended the passage, by each State and by the Congress for the District of Columbia and the Territories, of a law to provide for the appointment of Commissioners to confer with Commissioners from other States on the subject of uniformity in legislation, particularly in State laws.

The Conference is composed of Commissioners from each of the States, the District of Columbia, Alaska, Hawaii and Puerto Rico. In thirty-five of these jurisdictions, the Commissioners are appointed by the Governor or other Chief Executive acting under express legislative authority. In other jurisdictions the appointments are made by general executive authority. There are usually three representatives from each jurisdiction, chosen from lawyers, judges and teachers of law. All serve without compensation. Because of the official composition of the Conference, members of the Association cannot generally become members of the Conference through applications.

The object of the Conference, as stated in its Constitution, is "to promote uniformity in State laws on all subjects where uniformity is deemed desirable and practicable". The Commissioners are united in a permanent organization, and annually elect officers. The Conference meets in annual sessions usually for five or six days immediately preceding the meeting of the Association and generally at the same place. This year, because hotel accommodations in Atlantic City will not be available during the week preceding the meeting of the Association, the Conference will meet in Philadelphia.

The record of the activities of the Conference, the reports of its Committees, and the Acts drafted and offered by it and approved by the House of Delegates of the Association, are printed in the Annual Proceedings or Handbook of the Conference. The approved Acts are also printed separately.

The Conference works through Standing and Special Committees. In recent years all proposals of subjects for legislation are referred to a Standing Committee on Scope and Program. After due investigation and sometimes a hearing of parties interested, this Committee reports as to whether or not the subject is one upon which it is desirable and feasible to draft a uniform law. If the Conference decides to take up a particular subject-matter, the latter is referred to a Special Committee, which reports a tentative draft. Tentative drafts of Acts are submitted from year to year and are discussed section by section. When finally approved by the Conference, the Uniform Acts are submitted to the Association for its approval and are recommended for general adoption throughout American jurisdictions.

On occasions, the Conference has drafted Model Acts as distinguished from Uniform Acts. The distinction between a Model Act and a Uniform Act is that where there is a demand for an Act covering a subject matter in a substantial number of States, but where in the judgment of the Conference, it is not a subject upon which uniformity is necessary or desirable but where it would be helpful to have legislation which would tend toward uniformity where enacted, such Acts are designated as Model Acts. An example is the work of the Conference on a Model Administrative Procedure Act.

Historically, the Conference has been especially successful in the field of commercial law. The Negotiable Instrument Act, Sales Act, Stock Transfer Act, Warehouse Receipts Act, and Bills of Lading Act, are examples of statutes drafted by the Conference which have received widespread adoption.

Outside the field of commercial law, the Declaratory Judgments Act, the Partnership Act, the Limited Partnership Act, the Narcotic Drug Act, and the Veteran's Guardianship Act, are typical of statutes which have been enacted in a large number of jurisdictions.

An example of the manner in which the work of the Conference can be adapted to meet the need for uniform legislation is illustrated by the Uniform Simultaneous Death Act which, after several years of study, was first promulgated by the Conference at its annual meeting in 1940. At the close of the legislative sessions in 1943, this Act had been adopted in much more than half of the jurisdiction. The principal project now before the Conference is a Uniform Commercial Code, in the preparation of which the Conference is cooperating with the American Law Institute.

In addition to other subject matters on the program for the Philadelphia meeting, there will be consideration of a proposed Uniform Divorce Jurisdiction Act, which has been designated as an emergency subject-matter for this year's sessions.

(The requested information as to their membership, work, plans, etc., had not been received, up to the time for closing copy for this issue, from the following Sections:

Section of Patent, Trade-Mark and Copyright Law
Section of Judicial Administration
Section of Municipal Law
Section of Taxation

The corresponding data as to them will accordingly be published in our November issue).

LOUIS D. BRANDEIS

(Continued from page 652)

not mention it, Brandeis was a pioneer in taking the position, which now seems to have gained acceptance, that the Court will, whenever possible, refrain from deciding questions of State law, and will in such cases defer not only to the State courts, but to the lower federal courts.[25]

That, as a Justice, Brandeis wrote and voted within the pattern of the views he held when he became a member of the Court is strikingly demonstrated by his joining with the majority in the Coronado case.[26] Liberal as he had always been, he had consistently urged the responsibility of labor unions for their acts and even their incorporation as for the best interest of their members. Only in cases arising under the Volstead Act does Professor Mason find any inconsistency.

A reformer, influenced by his own predilections, Brandeis was no unthinking devotee of *stare decisis*. He was always alert to legal concepts "encysted in phrases so that they have ceased to provoke further analysis."[27] *"Stare decisis"*, he declared, "is ordinarily a wise rule of action but it is not a universal, inexorable command."[28] It "does not command that we err again."[29]

Brandeis' Craftsmanship in Opinions

Brandeis' craftsmanship was at its apogee in his dissenting opinions. Uninhibited by the necessity of obtaining concurrence in his views, his approach, his method or his phrasing, he used the dissent "as an educational device". (page 518). In his laboriously written and rewritten manuscripts he massed his "accumulated empirical data" and attacked with "lethal facts". (page 555). As Professor Mason says, he used "relevant law reports, secular literature, information from pertinent sources in a persuasive demonstration of what the law ought to be in terms of social justice." (page 518)[30] Professor Mason concludes that before his service ended, "the dissenter had, in his own time, become the prophet of the living law." (page 633).

"Brandeis and Holmes Dissenting"

To many the most interesting chapter will be "Holmes and Brandeis Dissenting". In it Professor Mason not only differentiates between the philosophies of Holmes and Brandeis, but uses this differentiation to emphasize the significance of Brandeis. The influence flowed not from Holmes to Brandeis, but from Brandeis to Holmes—so much so that Chief Justice Taft jocularly complained that Brandeis had two votes. True, because of their common tolerance of social change and their common responsiveness to the pressure of public opinion, there was a wide area of agreement. But there was a marked difference in their approaches and techniques. They frequently reached the same goal, but they did not travel the same way. Holmes was "calm and unmoved" and his deliberation was "aloof and detached". Brandeis' was a fighting faith, and his "work on the Court failed fully to satisfy his zeal for constructive endeavor." (page 584).

Holmes, equally skeptical of reforming zealots and die-hard conservatives, was inclined to uphold legislation because he believed in the right of the States to carry on experiments, whether to him they seemed good or bad; Brandeis "might well uphold or set aside legislation depending on whether the statute conformed to certain standards of social justice established prima facie by the facts." (page 573), and many of his dissents were based upon social values then unrecognized and stated the law of the future. (page 628).

Contrasts Between Brandeis and Holmes

Francis Biddle wrote that Holmes' "thinking in the field of economics stopped at twenty-five." (page 574). Brandeis had an unquenchable thirst for information that could be put to use and his guide was "knowledge of the conditions out of which modern legislation emerges." (page 573). Brandeis was an expert in handling widely dispersed facts; Holmes "could not bring himself to undertake 'the eternal pursuit of the more exact'" and "for the factual studies in which Brandeis reveled, Holmes expressed 'fastidious disrelish.'" (page 576). In his opinions Holmes strove for "literary charm and grace, the apt and cutting phrase" (page 641), the sparkling epigram; Brandeis demonstrated his propositions and fortified his exposition by copious documentation.

Professor Mason sums up in part by quoting Max Lerner: "Where Holmes had spoken of philosophy, Brandeis spoke of service to the nation; where Holmes talked abstractly of battle, Brandeis talked pragmatically of reform; where Holmes fashioned graceful phrases, Brandeis quarried in the hard rock of social reality." (pages 580-581). He adds: "Brandeis read economics as well as Euripides; Holmes read and reread Plato. . . Holmes is the

25. *Railroad Com.* v. *Los Angeles*, 280 U. S. 145 (1929; dissent).

26. *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922).

27. *Hyde* v. *U. S.*, 225 U. S. 347, 391 (1911).

28. *Washington* v. *Dawson & Co.*, 264 U. S. 219, 238 (1924).

29. *Di Santo* v. *Pennsylvania*, *supra*. In this connection Professor Mason quotes in a footnote from *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938): "The doctrine of *Swift* v. *Tyson* is 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" (page 683, Note 14, Chapter XL). Professor Mason does not otherwise refer to *Erie Railroad Co.* v. *Tompkins*.

30. One of Brandies' dissents has piqued the curiosity of lawyers. In his letter transmitting the Federal Rules of Civil Procedure to the Attorney General, Chief Justice Hughes wrote: "I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the Rules." Rumor has it that Brandeis felt that the Court had not sufficiently considered the Rules. Professor Mason does not mention this, and in a personal letter to me states that the material at his disposal threw no light on the subject. Professor Mason does say in another connection that Brandeis once expressed an opinion that no lawyer could reform the defects and abuses of the law. (page 435). A former secretary of Brandeis suggests to me that perhaps one reason for Brandeis' disapproval of the Rules was his belief in local autonomy.

enlightened skeptic; Brandeis, the militant crusader." (page 577).

A Highly Readable Biography

While Professor Mason does not ignore the other facets of Brandeis' career, he uses them primarily to point up his work in the law. He covers Brandeis' long-continued participation in the Zionist movement, and his refusal to leave the Court to head that movement. He describes Brandeis' excursions into politics, first as a follower of Robert M. LaFollette and then as a campaigner for and adviser of Woodrow Wilson. Of special interest is the disclosure of Brandeis' opinion of Wilson's political ineptitude in seeking to further his post-war policy.

Professor Mason's judgment is discriminating; his factual statements are abundantly documented. The book is highly readable. In my judgment, of all the biographies published this year that I have read, it is the most significant.[31]

31. The publisher has done an admirable job. The format is excellent. The jacket carries a splendid reproduction of the Platt bust presented to the Court in 1942. See Note 17, *supra*.

BOOKS FOR LAWYERS

(Continued from page 665)

They have spoken with vigor and passion, solemnly and even shrilly, and they are convinced their utterances have fallen on deaf ears.

Each scientist feels like Coleridge's haunted man, quoted in *Frankenstein:*

> Like one who, on a lonely road,
> Doth walk in fear and dread
> And, having once turned round; walks on,
> And turns no more his head;
> Because he knows a frightful fiend
> Doth close behind him tread.

Our newspapers, weeklies, and other periodicals have tried their best. The usually sedate *Saturday Review of Literature* published the brilliant essay "Modern Man Is Obsolete." *Life* has spared no expense to present the most vivid pictures. *The Saturday Evening Post* gave its lead-off space to Alsop's forthright article. The *Reader's Digest* has carried the truth to its millions of readers. This list could be extended indefinitely. The radio and the movies have done their part. And what is the result?

Hiroshima and Nagasaki are facts and the facts do *not* register.

The world is indeed upside down. A visitor from Mars dropping in at the Security Council of the United Nations or the Peace Conference at Paris would surely believe that Russia, not the United States, possessed the bomb and the secrets of its manufacture.

The Secretary of War has this summer instructed the Army to base its plans on the assumption that atomic energy will *not* be subjected to international legal controls.

All this in face of the unprecedented offer by the United States to yield up its secrets and its stockpile of bombs to an International Authority. The nation which first discovered gunpowder made no such offer; Philip held close to himself the secret of the striking power of the Macedonian phalanx as did Caesar the maneuverability of the Roman legion.

Mr. Baruch, building on the Acheson-Lilienthal Report, has proposed not only control of atomic energy but with remorseless logic has offered plans for the total outlawing of all war.

It would surely seem that such proposals, intelligently and sincerely put forth, would arouse a tremendous response in the hearts of a suffering and bereaved humanity. Yet, all is silence.

The fact is that the popular support, which is indispensable for our leaders on the political level (and the atomic bomb can be handled only there) is not forthcoming. Nobody seems to know or care what is going on these days in the Henry Hudson Hotel in New York.

Our offers have not only not been accepted, they have been rebuffed.

Meanwhile, in secret factories in various nations, scientists are diligently following the trail to nuclear fission. They have covered 20 per cent of the distance, and probably more. When they reach their goal, diplomatic language will not change, because it could not be worse, but angry words will unquestionably lead to hostile *action*.

Now *The New Yorker* has tried to see what it can do. It may arrest attention when a witty magazine, devoted to the lighter side of life, feels compelled to lay aside its urbane sophistication, omit all pictures and cartoons, and devote an entire issue to trying to reach into your consciousness.

Its Editors say:

> The New-Yorker this week devotes its entire editorial space to an article on the almost complete obliteration of a city by one atomic bomb, and what happened to the people of that city. It does so in the conviction that few of us have yet comprehended the all but incredible destructive power of this weapon, and that everyone might well take time to consider the terrible implications of its use.

I hope you will read it.

In the columns of the JOURNAL I have been doing what I could to bring to the attention of the 37,000 lawyer-members of the American Bar Association the best lay literature on the subject which they could buy cheaply, read easily and thus acquire the information which would enable them to give statesmanlike guidance to their fellow-citizens in their own communities where so many of them are the acknowledged civic leaders.

I fully realize that I have been no more successful in accomplishing the mission assigned to me than far better equipped men have been in attaining theirs.

Yet you might be induced to glance at this issue of *The New Yorker*. It reduces the vast pano-

rama to individual, concrete, human terms. All of us can read in our morning paper that hundreds of thousands of poor wretches in India or China lack sufficient food to sustain life and, without pause or emotion, turn over to the sports page. But tell us that one child on our own street is dying from starvation and we act.

Read then what happened to six human beings who were in Hiroshima at exactly fifteen minutes past eight in the morning on August 6, 1945, Japanese time, and who lived (though far from unscathed) to tell their tales.

They are: Miss Sasaki, a young clerk in the East Asia Tin Works; Dr. Fujii; Mrs. Nakamura, widow of a tailor and mother of two children; Father Kleinsorge, priest of the Society of Jesus; Dr. Sasaki, surgeon at the Red Cross Hospital; and Mr. Tanimoto, pastor of the Hiroshima Methodist Church.

It is averred that public opinion has been slow to crystallize and mobilize because awareness takes time and mankind is confronted with a problem that has no parallel in all history.

That is not true. A deadly parallel exists. While the release of atomic energy is novel and revolutionary in the realm of science, an equally novel and revolutionary concept was released two thousand years ago in the even more important world of the spirit.

Yet Christ, shortly before His Transfiguration, felt compelled to speak these words of admonition:

> Having eyes, see ye not? and having ears, hear ye not? and do ye not remember?

Mr. Baruch's opening words to the United Nations Atomic Energy Commission on June 14, 1946, were:

> We are here to make a choice between the quick and the dead.
>
> Behind the black portent of the new atomic age lies a hope which, seized upon with faith, can work our salvation. If we fail, then we have damned every man to be the slave of Fear. Let us not deceive ourselves: We must elect World Peace or World Destruction.

Those are true words and irrevocable words. Inevitably they recall the prophetic utterance in Deuteronomy:

> I call heaven and earth to record this day against you, that I have set before you life and death, blessing and cursing; therefore choose life, that both thou and thy seed may live.

REGINALD HEBER SMITH
Boston, Massachusetts

LIVES OF THE INTERSTATE COMMERCE COMMISSIONERS AND THE COMMISSION'S SECRETARIES. *By C. A. Miller. June, 1946. Washington, D. C.: Reprinted from I.C.C. Practitioners' Journal. $2.50. Pages 175.*

This book represents a prodigious labor of research and will be especially interesting to those who have had acquaintanceship with the personalities treated. It will never displace Plutarch's *Lives* for vividness of portrayal nor Macaulay's *Essays* as analytical studies of character. In fact it would be more entertaining if high-lighted by occasional concessions that not all of these characters were 100 per cent infallible and that in some few instances better men could have been appointed. Dealing with so many, the book cannot explore by-paths which might lead us to more personal and intimate glimpses into the lives of the Commissioners. A compendious biographical dictionary must differ from Boswell's *Life of Johnson* or Freeman's *Life of Robert E. Lee.*

Fortunately, Mr. Miller does not give equal weight to each of the subjects of whom he writes. Naturally, such men as Judge Cooley, the first Chairman of the Commission, and Commissioners Eastman and Aitchison, receive more space because of their outstanding contributions to the work of the Commission. The sketch of Commissioner Eastman is particularly interesting and it has been easy for the author to enhance the value of his book by judicious quotations from the speeches and writings of this truly great man who possessed qualities of character and high purpose worthy of emulation by all public officials. Long an advocate of Government operation of railroads, this "ideal public servant" did not shrink from changing his views when the "wisdom of experience" prompted him so to do—a course exemplifying his maxim that "zealots, evangelists and crusaders have their value *before* an administrative tribunal, but not *on it.*"

The book affords convincing evidence that, by and large, the men who have composed the Interstate Commerce Commission through the years have been actuated by a high sense of public duty and zealousness to preserve a tradition of impartial justice.

CHARLES D. DRAYTON
Washington, D. C.

EISENHOWER'S OWN STORY OF THE WAR: *The Complete Report by the Supreme Commander on the War in Europe from the Day of Invasion to the Day of Victory. By General Dwight D. Eisenhower. 1946. New York: Arco Publishing Company. $1 (paper-bound); $2.50 (cloth and boards). Pages 122.*

This important chronicle, submitted to the Combined Chiefs of Staff on July 13, 1945, and unexplainedly withheld by the War Department for a year, will enhance the author's reputation as a statesman and diplomat, but not as a reporter or historian. While it gives a good picture of the Headquarters (SHAEF) impressions of the military operations in the European Theater, and provides the material for refuting much that has been written, since General Marshall's report, in Ralph Ingersoll's *Top Secret* and other criticisms of the strategy and operational detail on the Continent, General Eisenhower has necessarily omitted the disagreements and rivalries as to command, objectives, and timing. These incidents of the heat and tense anxieties of the decisive struggle he could not have put to paper without wounding national and personal sensibilities which he and his coun-

try still could not afford to offend.

So when he writes that "In the matter of command, it can be said here that all relationships between British and American forces were smooth and effective," informed persons realize that he has sketched a skillful sentence and has excluded even a mention of known controversies with which he had to cope. He carries this caution to the extent of giving Winston Churchill no momentous role in the discussions of strategy or command, and does not mention historic trips by Churchill to the Continent for the purpose of urging particular courses on the Supreme Commander. Further light on this aspect of the report may be gained from a reading of Churchill's "tribute" to Eisenhower in the House of Commons, which seemed to many to be in reality a studied and skillful "deflation" of the Supreme Commander as a military Strategist.

In the nature of things, General Eisenhower has written an official report, and has done so in excellent temper and tempo; he has contributed to the documentation of history, but has not written it. Above all, he has remained faithful to the spirit and the necessities of Anglo-Saxon unity, which he fostered and prized during the war and plainly seeks at all hazards to perpetuate for the peace.

The document is bound to bring to Americans a sense of reassurance as well as pride that a military officer whose rank and experience were far from outstanding when America made ready for war should have tied together the military factors in so effective an operation and, above all, displayed such sagacity and skill in handling the critical political factors which beset his course. His stature as a seasoned American statesman may outlast the final verdicts of historian and military critics as to SHAEF.

ALLOCATION OF INCOME IN STATE TAXATION. *By George T. Altman and Frank M. Keesling. August 1946. Chicago and New York: Commerce Clearing House, Inc. $4. Pages 263.*

A plethora of books has been produced as to the intricate problems of federal taxation of income. Here is welcome help as to State taxation of income, where taxpayers receive income which is claimed to be within the taxing jurisdiction of more than one commonwealth. The authors write evidently from practical experience.

This handbook by Los Angeles lawyers experienced in the field explains carefully the provisions and principles which are now applicable in determining what part of income each State can and does tax. The confusing and disordered allocation provisions now operative among various States are analyzed and clarified as far as can be. The authors give also what they deem to be a practical, workable plan for ending the chaos and working toward more uniform criteria.

The contents include the nature and importance of allocation, the constitutional limitations, allocations according to domicile and residence, the theory of the apportionment formulae, the allocation formulae in practice, interdependent taxes and a plan for compelling uniformity in allocation methods. Ample references to precedent are provided in footnotes. Features which may prove useful to lawyers are the answers given to allocation questions arising in many States, an analysis of the limits of the taxing power of a State, the deductions allowed by each State for income taxes, the credits allowed for taxes paid other States and foreign countries, an explanation of the theory and practice of computing interdependent taxes with detailed illustrations of the step-by-step method, the converging series method and the algebraic method and a comprehensive statement of the law and practice on allocations.

A TRIAL ON TRIAL. *By Maximillian J. St. George and Lawrence Dennis. 1946. New York: The National Civil Rights Committee. $5. Pages 503.*

This book is dedicated "To the self-sacrificing members of the American Bar, who so ably and gallantly defended that corner-stone of our liberties, freedom of speech, in the Great Sedition Trial at Washington, April 17 to December 7, 1944."

The authors are Maximillian St. George, member of the Illinois State Bar Association, who represented one of the defendants in the Mass Trial, and the brilliant Lawrence Dennis, erstwhile free lance contributor to *Reader's Digest*, at one time a member of the diplomatic service of the United States, a defendant accused on the abortive trial. The volume is written from a rankling sense of injustice and public peril; it is published by the National Civil Rights Committee, which cared little or nothing for the defendants who were so indiscriminantly herded together for trial but has been indefatigable in its defense of what it believed to be their civil liberties menaced by Government.

Such a work of course lacks balance and perspective, and is hardly an impartial chronicle of the Mass Trial. Nevertheless, its documents and factual presentation are such as to add to the feeling of uneasiness which many lawyers and others have felt concerning many phases of the inquisition and trial which was one of the most disturbing incidents that went virtually unchallenged by public opinion during the tense stages of World War II. There seemed to be a good deal of reason for believing that the real target of the inquisition was freedom of the press, the independence of great magazines, rather than the suppression of freedom of speech for many of the motley individuals accused. In the times of peace which have come, the organized Bar will find in this book abundant reason for vigilance that such travesties on justice shall not recur to threaten public confidence in the inviolability of the constitutional guarantees of freedom.

"Previews" of Books

REMINISCENCES OF FIFTY YEARS: Julius Henry Cohen, long active at the New York Bar and in many civic causes, member of the American Bar since 1908 and often taking an active part in floor discussions at Annual Meetings, has written a book of reminiscences of the past fifty years under the title *They Builded Better Than They Knew.* The "they" refers to the personages described; "they" include Alfred E. Smith, Dr. Felix Adler, Frank Damrosch, Theodore Roosevelt, Louis D. Brandeis, Franklin D. Roosevelt. Mr. Cohen was general counsel of the Port of New York Authority from 1921 to 1942, and took part in conspicuous litigation as to the powers and immunities of that pioneering agency. Julian Messner will publish the book in October.

BIOGRAPHY OF ALEXANDER STEPHENS: A contribution to American historical writing is promised in the biography of *Alexander Stephens,* the Georgia lawyer and member of the Congress, who became the Vice President of the Confederate States. Rudolph Abele is the author, and he has made use of many unpublished documents in his new interpretation of this forceful personality of the American Bar. Alfred A. Knopf announced the volume for late September publication. Walter P. Armstrong will review it in our next issue.

TREATY-MAKING POWERS AND RATIFICATION: In a new series to be known as the Cambridge Studies in International and Comparative Law, the Cambridge University Press announces in England and the Macmillan Company in the United States the fall publication of the first two volumes. The Editors of the series are the authoritative H. C. Gutteridge, H. Lauperpacht and Sir A. D. McNair, the last-named now a member of the International Court of Justice. The first volume, *Comparative Law,* by Dr. Gutteridge, will deal with the origin and meanin of comparative law and also describe its process. The second volume, *Full Powers and Ratification,* by J. Mervyn Jones, is concerned primarily with treaty-making procedures and the methods by which international agreements, including multilateral conventions, are concluded and ratified. These volumes for the libraries of legal scholars will be reviewed here when they are received. (Prices probably $3 and $3.50 for the respective volumes).

SCIENCE AND POLITICAL PROBLEMS: The University of Chicago Press will publish about October 14 *Scientific Man vs. Power Politics* by Hans J. Morgenthau, Associate Professor of Social Science at the University. The thesis of the book is that modern science and its methods cannot lead a country or the world out of the jungle of power politics, because politics is an art, not a science, and the political world will not yield to scientific reason. ($3.)

MORE OF "LEVIATHAN": Anent the great debate which has been raging in the columns of the JOURNAL concerning the basic problem of "too-big" government, the sovereign state, the ruthless "Leviathan" conceived by Thomas Hobbes three centuries ago. The Viking Press announces for publication this fall *Leviathan in Crisis,* an international symposium on the Nation-State, its past, present and future. Fifty-four prominent contributors from nine different countries, give their understanding of the problems which Ben W. Palmer pioneered in our columns ("Defense Against Leviathan": 32 A.B.A.J. 328-332, 360). This book will be reviewed as soon as it is published. ($3.75).

WHAT IS RUSSIA UP TO?: Ziff Davis will publish in October *Behind the Iron Curtain,* by William Van Norwig. The author was born in Russia, lived there until he was twenty-five, came to the United States and became an American citizen. His numerous trips to Russia have included one in 1944 as a Lieutenant Colonel in the United States Army's Military Intelligence.

WHAT THE WAR DID TO THE CONSTITUTION: Professor Edwin S. Corwin, McCormick Professor of Jurisprudence at Princeton University, has brought together the lectures which he delivered at the University of Michigan Law School under the auspices of the W. W. Cook Foundation. Alfred A. Knopf is publishing them this fall, under the title *Total War and the Constitution.* The challenging thesis of the lectures was that the powers delegated to or assumed by the President, in international affairs and domestic policies, during the war crisis have virtually ended, in favor of Executive supremacy, whatever balance of powers between the three branches of government had survived according to the constitutional plan. This aggrandizement of centralized power is seen as having been so far confirmed by the Supreme Court and insisted on or acquiesced in by many elements of voting strength among the people that the sporadic efforts of the Congress to withdraw the emergency powers and regain the prestige and functions of the legislative branch have not prevailed. Because of the interest of lawyers in Professor Corwin's provocative conclusions, this department will review this book.

HOW TO ARBITRATE A LABOR DISPUTE. *By Theodore W. Keel. August 21, 1946. New York: Prentice-Hall. $1. Pages 20.*

A compact and utilitarian little

pamphlet has been brought together by "Ted" Keel, of the New York Bar, who has fashioned a career from his work in labor arbitrations and was both a Public Member and the Executive Director of the NWLB. He has figured in the arbitration of more than a few labor disputes and has contributed to the constructive programs of the American Arbitration Association. His "know-how" has been put in this brochure.

STILL TIME FOR DECISION?: Harper and Brothers announce for October 9 a book of compelling importance for students of international affairs, titled with the absorbing question, *Where Are We Heading?*, by the outspoken Sumner Welles. He appraises the prospects that The United Nations can save the world from war, points out ineptness and failures in the foreign policy of the United States, shows how wise statesmanship could regain leadership for peace, security and law. His *Time for Decision* has sold more than 380,000 copies. You may dislike Welles and disagree with his views, wholly or in part; but they have expertness and authority, and they should be read because they always influence American thinking and sometimes have impacts on the avowals of American policy.

UNORTHODOX VIEW OF THE FUTURE OF AMERICAN PRIVATE ENTERPRISE: Elwood, Indiana, will be back in the news on October 11. D. Van Nostrand and Company will publish on that date *A Rebel Yells*, by H. Fred Willkie, a brother of the late Wendell Willkie, and vice-president of Joseph E. Seagram and Company; and Elwood in the Hoosier State will be again the scene of "big doings" on the publication day. The book is modestly said to deal with the critical problems of all people who work for a living and draw pay checks—or sign them. "I am diametrically opposed to the tendency to keep society as it is", says Mr. Willkie (H. Fred). He argues that the "profit motive" cannot be kept as an end in itself; he urges "a new kind of industrial thinking", which pre-supposes some untrammelled and thorough thinking first by lawyers.

THE LOSS OF INDIVIDUAL PROPRIETORSHIP: Henry Holt and Company announces for October 14 the first American publication of *The Servile State*, an almost prophetic discussion of modern political society, in which Hilaire Belloc maintained in 1912 that both Capitalism and Communism (as we now understand it) were heading toward a society in which the individual would be removed from ownership and the pride of operation of the means of production. Dr. Christian Gaus writes the introduction. ($2.50).

Letters to the Editors

To the Editors:

What are "The 'Objects' of the American Bar Association"? In 250 words? I write in response to the Editorial in 32 A.B.A.J. 153.

Is the American Bar Association an organization to *promote* and *secure* the right to *exploit* the profession of the law to lawyers as morticians of laws? No—thank God it is NO!

To discuss the object—to promote the administration of justice—one could easily write volumes.

The "administration of Justice" begins with the formulation and proclamation of the *Law* by legislative bodies and is carried to its lawful ends by enforcement at the hands of the Executive departments of government. Only disputes which frame the form of litigation get into the hands of the *Judiciary*.

"The term 'administration of justice' is a broad and comprehensive term. It means something more than the mere trial of a cause. It includes everything connected with the determination of the rights of person and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceedings and process by which such determinations are embodied in a final determination therein, according to the established law of the land". *State* v. *Post*, 6 Oh S & CP 200, 206, 4 Oh NP 157, 1 CJ 1239.

Except by boldly taking a position upon a *controversial* issue, before the lawmakers enact a *Law*, how can the Association lay claim that it does "promote the administration of justice"?

Certainly the repeal of bad laws is in line with this "object". How much more effective can the administration of justice be made through the activities of the American Bar Association is one of the questions!

How can the Association "correlate the activities of the Bar organizations in the interest of the legal profession and of the public throughout the United States" except by taking a position on a controversial matter of public concern?

How long can lawyers and the Association claim to be *leaders* when their *action* is *negative* and not *positive*?

To be *negative* is at least a *privilege* and may be a *right*, but, to lift a line from the JOURNAL's great article about Dean Roscoe Pound —"I am a man, and consider nothing human to be foreign to me"—can the Bar and lawyers continue to be *leaders* when we raise the point of order—how does this concern lawyers?—on issues which will be the foundation of "fundamental principles and primary values" of tomorrow's living.

Are not the purposes of good government set forth in the preamble of our Constitution?

How long will we stand on the platform scale "This is my right" and ignore the balance "This is my obligation"?

CLARENCE W. BEATTY
Office of United States Attorney
Chicago

P.S. Why not publish side by side the arguments—discussion—of the two positions on a single issue, such as the Wagner-Taft-Ellender Bill.

Editor's Note: As this and other issues of the JOURNAL *will attest, it is our policy and purpose to publish reasoned presentations of opposing views on the legal aspects of many vital issues which affect the profession and the public. When the House of Delegates debates, determines and declares the Association's policy and attitude on such a question, the* JOURNAL *supports and advocates the Association's policy; but within our limitations on space during the paper shortage, we do not close our minds or our columns to other considered views.*

Mr. Beatty's forceful statement of his concept of the "objects" of the Association merits reading and pondering. The invitation which we extended to Association members (32 A.B.A.J. 153) to state, with a 250 word limitation, their concept of what the Association (and its JOURNAL*) should try to be and do, is still open.*

To the Editors:

One of the most pleasant features of the JOURNAL is "Books for Lawyers" and one of the most entertaining and informative contributors thereto is Walter P. Armstrong. When you have read a review by Mr. Armstrong you not only have a good idea of the book, but you have enjoyed some good writing for its own sake. Too many reviewers either tell you what a book is about and bore you in the process or write a witty and entertaining article and overlook entirely the meat in the cocoanut. Let us have more reviews by Mr. Armstrong.

Occasionally Mr. Armstrong, perhaps in a spirit of playfulness not unmixed with malice, uses such expressions as "mercenaries in logomachy" (see August issue of the JOURNAL), well knowing that ninety per cent of his readers will have to reach for the dictionary. Reaching for the dictionary is good exercise if not overdone and you do not have a tennis elbow. May I suggest to Mr. Armstrong that two reaches per review should be the limit.

C. M. CHAREST
Washington, D. C.

To the Editors:

In the August issue of your JOURNAL, page 507, there is a review by W. P. A. of my book *Nevada Lawyer.*

The reviewer finds the book cynical and sordid but what he fails to find is the truth as a basis for serious thought and reflection, which was my purpose in writing the book.

PAUL RALLI

Las Vegas, Nevada

To the Editors:

The JOURNAL has rendered a distinguished public service by publishing in the August issue Major Blakeney's argument in support of the motions to dismiss the "indictments" against the Japanese "war lords" for want of jurisdiction. Publication in the JOURNAL will make this magnificent argument readily available to students working over the material of the Tokyo and Nuremberg "trials" in years to come.

I use the word "magnificent" advisedly, for the argument, it seems to me, is not only conclusive on the law but is legal writing of a very high order. One hopes there will come a time when all men will agree with this statement from Major Blakeney's peroration:

> We speak for the proposition that preserving legal forms, while ignoring the essence of legal principle, is the supreme atrocity against the law.

The same point is made, although I believe less eloquently, in your editorial on the Mikhailovitch "trial," in the same issue, where you speak of the lesson which that "trial" has for American lawyers. "This lesson," you say, "is that forms and routines of trial are not enough." If that is so in the case of General Mikhailovitch, as it indubitably is, why is it not also true in the case of those whom the Allies are "trying" in Tokyo and Nuremberg?

LESTER E. WATERBURY

New York

To the Editors:

The article by Attorney General Tom C. Clark, in the August issue is but a clever attempt to justify the invasion of states rights by the federal government.

It still smells the same under the guise of "balance of power" between the states and the nation.

M. M. PIXLEY

Seattle, Washington

Death of a Beloved Worker

At the last moment of "closing forms" for this issue, word came of the passing on September 19, of John Howard Voorhees, of Sioux Falls, South Dakota, who was one of the men whose devoted, untiring service helped mightily to make our Association the sound and influential institution it is today.

He became a member of the Association in 1896, and served it faithfully in many capacities. In 1927, he became its Treasurer, for eighteen years he gave of his time and efforts unstintingly to conserve its resources, shape soundly its financial and accounting policies, and keep the growing, sprawling organization on firm, enduring foundations. In the Board of Governors and in the National Conference of Commissioners on Uniform State Laws he was an untiring worker for the interests of the profession and the public.

This small-city lawyer literally gave all of his best to the Association. In 1945, failing health led him to decline to accept re-nomination for re-election as Treasurer. His service in that capacity ended with eighteen terms, but his interest did not flag. His last appearance in the House of Delegates was on July 2 (32 A.B.A.J. 488), when he was given an ovation by the members who recalled gratefully his long service.

Mr. Voorhees was born on February 20, 1867, in South Branch, New Jersey. He was graduated from Rutgers College in 1888. He has practiced law in South Dakota since 1890, and attended to the interests of substantial clients. His avocation and his "hobby" were the Association.

He will be missed from his place at our meetings, but his years of self-effacing work for the Association will remain as one of its cherished heritages and traditions. Many of the younger men will speak often of the kindliness and thoughtfulness of this South Dakota lawyer. Such as he have builded the American Bar Association.

Practising lawyer's guide to the current LAW MAGAZINES

ARBITRATION—*"The Lawyer's Stake in Arbitration":* An outline of the development of arbitration in England and in this country, which will be of special interest to lawyers whose experience in this field may be limited, is contained in the Summer issue of *The Arbitration Journal* (Vol. I, New Series—No. 2; pages 128-134). John T. McGovern, Chairman of the Committee on Arbitration of the Association of the Bar in the City of New York, considers in particular the function of the lawyer in modern arbitration procedure. He notes that the fundamental principles of arbitration were established by the decisions of courts. Later, however, commerce and industry became inclined to take matters in their own hands, even to the extent of excluding lawyers from arbitration proceedings, and flaws in arbitration were less frequently taken to courts and more frequently to trade boards. The change caused a serious loss in the steady development of superior principles of arbitration, since the trade groups were more concerned with effecting a compromise than with the justice and equity of a given situation. In 1920, New York State responded to the need for betterment of existing conditions by enacting an Arbitration Law. Fourteen other States have since passed similar laws. Mr. McGovern says that as a result lawyers now draw the contracts that contain arbitration clauses, appear on behalf of clients in the arbitration tribunals, and act as arbitrators in tribunals. He concludes that the spread of arbitration, which he sees as having relieved the country of a waste and burden from disputes, is in large part due to the leadership of lawyers, who are finding through the channels of organized arbitration a means for implementing their age-long search for equity and justice. (Address: American Arbitration Association, Inc., 9 Rockefeller Plaza, New York 20, N. Y.; price for a single copy: $1.00.)

ANTI-TRUST LAWS—*Restraints of Competition—Freedom of the Press—"The Associated Press Decision":* The *Associated Press* decision (326 U. S. 1) is the subject of comment in two incisive and informative articles in the April and June issues of the *University of Chicago Law Review*. In the April issue (Vol. 13—No. 3; pages 247-265), John Henry Lewin, of the Baltimore Bar, counsel for the Government in the *Associated Press* case, discusses in detail its factual background and the several opinions rendered in the District Court and Supreme Court, in the light of prior judicial decisions under Sections 1 and 2 of the Sherman Act. It is apparently his view that the size and comprehensiveness of the Associated Press' program, rather than the nature of business affected, afforded a proper basis for the Supreme Court's decision affirming summary judgment in favor of the Government, although he observes that the statement in Mr. Justice Black's majority opinion that "the Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete", appears to carry this branch of the anti-trust laws "to the farthest point yet reached by the decided cases."

In the June number of the same review (Vol. 13—No. 4; pages 471-476), Howard Ellis, of the Illinois Bar, attorney for two of the defendants in the *Associated Press* case, makes a spirited reply to Mr. Lewin's article. He points out four basic contradictions which he considers to be inherent in the decision in the *Associated Press* case. He maintains that both the District Court and the Supreme Court found it difficult to fit the activities of the Associated Press into the patterns of illegal restraints fashioned by former decisions under the Sherman Act, as evidenced by the five opinions filed by the eight Justices who sat in the case; and he submits that the result in the litigation represents a confused attempt to impose upon a single organization in a particular field of endeavor the status of a quasi-public utility. The whole litigation and its outcome, involving the status of a great newsgathering agency on which the independent press and informed readers depend, has had disturbing ramifications and implications which are not answered or quieted by either article. (Address: University of Chicago Law Review, 5750 Ellis Avenue, Chicago, Ill.; price for a single copy: 75 cents.)

CONSTITUTIONAL LAW—*Civil Rights—"Liability of Public Officers to Suit Under the Civil Rights Acts":* This "note" in the July issue of the *Columbia Law Review* (Vol. XLVI—No. 4; pages 614-622) considers the

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.*

effects of the Civil Rights Acts, in the light of recent decisions, upon the liability to suit of public officers, including judges and public prosecutors. There has, of course, been a tendency to limit the liability of public officers upon the ground that the need for capable men for public office, able to make decisions without fear of personal liability, outweighs the public interest in protecting individuals from possible oppressive official action. Although the language of the Civil Rights Acts (Rev. Stat. § 1979, 8 U.S.C. § 43) makes possible a breach in the doctrine of judicial immunity, the courts have denied relief where damage actions have been brought against judges. However, in the recent case of *Picking* v. *Pennsylvania R.R.*, 151 F. (2d) 240 (C.C.A. 3d, 1945), it was held that State judges and public officers may be liable in damages for violation of the Civil Rights Acts. While the Court declared that liability could be imposed where a judge has conspired with others "in a conscious design" to deprive a person of civil rights, it is noted that the same opinion hints that liability may be extended beyond willful violations. The author of the "note" suggests that, as the Civil Rights Acts are being invoked with increasing frequency, the need for maintaining a strong judiciary calls for careful scrutiny of further attacks upon judicial immunity. (Address: Columbia Law Review, Kent Hall, Columbia University, New York 27, N. Y.; price for a single copy: 85 cents.)

CONSTITUTIONAL LAW—*The American Federal System—"The Function of the States":* Professor Max Radin, of the University of California School of Jurisprudence, offers his conception of the present-day role of the forty-eight States of the American Union, in the February issue of the *Oregon Law Review* (Vol. XXV—No. 2; pages 83-102). In his defense of the States, Professor Radin supports traditional arguments of the pro-federalism political scientists; viz., that, since subdivision is necessary in governing a territory as large as the United States, bureaucracy with its attendant evils is best avoided by constituting the divisions as separate and independent political units rather than as agencies of a centralized authority. He adds that "Since there must be divisions into political units, all human experience indicates that those that have been created by the more or less casual facts of historic development are more likely to work than those arbitrarily arranged according to a set plan. In other words the existing forty-eight States which were the results of human pressures have the enormous advantage of needing no other justification than that fact." After treating the various characteristics and functions of the States (as sovereign communities, schools of self-government, guarantors of freedom, centers of experimentation, etc.), the scholarly article points to full *State*-sponsored liberty and economic opportunity as the "still distant goal". (Address: Oregon Law Review, School of Law, University of Oregon, Eugene, Ore.; price for a single copy: 75 cents.)

INTERNATIONAL LAW AND ORGANIZATION — *The United Nations — Information and Documents Regarding Its Work—"Evolution of Human Rights" in Many Nations:* The Department of Public Information of The United Nations has established the *United Nations Weekly Bulletin*, of which the first issue was made from the temporary headquarters at Lake Success, Long Island, on August 3. Providing a concise official account of the activities of The United Nations and its many specialized agencies, the proceedings and resolutions are reported and the historic events are set in perspective by background information.

An invaluable feature, for those who are studying or following any phase of the work of the Organization, is the continuing list of the available documents and the sources from which they can be obtained. Messages and statements from leading personalities survey and report as to the work of the parts of the Organization with which they are connected. Interesting photographs are given, both of personalities and of "landmarks" of the Organization. The *Bulletin* is already published in English and French; editions in other languages will follow.

The issue for August 12 (Vol. I—No. 2; pages 12-15) contains a highly informative account of the "Evolution of Human Rights", the struggles to achieve fundamental freedoms in many lands, with photographs of the historic documents which illumine the way—such as the Norwegian Charter of King Magnus, "the Lawmender" (1275), which proclaimed equality before the law to all classes of people; the Bill of Rights drawn up by the British Parliament in 1689, which summarized the rights of the citizens and the powers of their elected government; the Declaration of American Independence in 1776; and the Declaration of the Rights of Man and of the Citizen, promulgated by the French National Assembly in August of 1789, the first year of the French Revolution.

It will be seen that the contents of the *Bulletin* are interesting and helpful material for lawyers performing their civic duties in these times. The *Bulletin* can be subscribed for by anyone interested. For the present, copies from the first issue can be obtained, to enable the keeping of a complete line. (Address: International Documents Service, Columbia University Press, 2960 Broadway, New York 27, N. Y.; price for a single copy, 15 cents; annual subscription, $6).

LABOR LAW—*"Employers' Freedom of Speech and the Wagner Act":* The touchstone of an employer's freedom of expression in matters involving labor unions is that his speech—oral or written—should not have a coercive effect upon the employees' right to self-organization. What is coercive is determined from the subjective viewpoint of the employee.

Inasmuch as the principles of collective bargaining have gained general acceptance and labor organizations have become firmly established, the coercive and threatening effect of an employer's statement about unionization and other labor activities has become lessened, for employees know that their right to organize and their freedom from discrimination are fully protected. This being so, the employer today may safely and soundly be given greater freedom to speak his mind about unionism, labor policy and problems, and as to his attitude towards a particular union and its leaders.

The purpose of the article by Robert D. Morgan in the June issue of the *Tulane Law Review* (Volume XX—No. 4; pages 469-523) is to encourage the according and the exercise of the employer's right of free speech. It shows where its exercise has been upheld by the NLRB and the courts and the circumstances under which it may be indulged with a minimum of risk against a charge of violating the Wagner Act.

If the author does not succeed fully in instilling complete confidence in the employer's right to speak freely, the fault is not his but in the unsettled state of the law, and the difficulties and diffidence of lawyers in advising, as to the scope and extent of an employer's right to free expression as to matters of concern in the conduct of his business. But the trend toward a restoration of an employer's prerogative of making fair and reasoned statements to be considered by employees who know their own power to choose and decide is clearly discernible, and it will doubtless become more so as employers are advised by counsel to assert their constitutional right with courage, provided they have and observe a clear understanding of the employees' right to self-organization, against which the law brooks no employer coercion or interference. (Address: Tulane Law Review, New Orleans, La.; price for a single copy: $1.)

LEGAL EDUCATION—*"Continuing Education of the Bar"*: Professor Sidney Post Simpson, on leave from Harvard Law School, now Visiting Professor at New York University Law School, has devoted much study to improving methods of legal education. Currently, as Chairman of the Committee on Refresher Courses for Veterans, in the Association's Section of Legal Education, he has taken part in the development of methods, sponsored by many State and local Bar Associations, for bringing the returning serviceman abreast of developments in law during the war years. In an article, entitled as above, in the May issue of the *Harvard Law Review* (Vol. LIX—No. 5; pages 694-719), he visualizes the problem of the returning lawyer-veteran as being but one phase of the broader question of supplementing law school education with practical and continuing instruction at the Bar. He recognizes that practical instruction can only be provided by the practicing Bar. He greets the sponsorship of refresher courses for lawyer-veterans, as being the beginning of a program of practical instruction that can and should become a permanent part of an American system of education and training in the law as a means of service to clients, the public, and the cause of a progressive jurisprudence. (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 85 cents.)

LEGAL EDUCATION—*"Integrating Law and Other Learned Professions"*: In these days of widely ramified human relations, the practising lawyer knows well enough that his profession is neither isolated from nor insulated against the numerous cross-currents from other fields of thought and endeavor. His experiences in general practice and the extent to which, in his counselling, he calls upon the data assembled by other professions would furnish interesting evidence on the interrelation of the arts and sciences, to which the symposium in the *Virginia Law Review* for June is devoted (Vol. 32—No. 4; pages 695-901).

As the above-quoted title of the article suggests, the question discussed in the symposium is the *integration* of law and other professions. This is taken to mean, according to the numerous articles included in the discussion, not only the utilization by lawyers of data assembled by other professions, but also the development of trends within the law more closely attuned to the objectives of human relations which other sciences, such as sociology and economics, have demonstrated to be sound. This department cannot, with its limited space, review adequately and in detail the many articles which constitute the valuable symposium. Some are confined to rather general discussions of the possibilities of better integration; such as, for example, the article on "Legal Theory and Banking Practice", by Wilbert Ward, Vice President of the National City Bank of New York. Others consider the question on the higher level of philosophy; such as, "Social Values and The Philosophy of Law," by Professor Otis Lee, of Vassar College. A few approach the question from the viewpoint of the concrete problems, and these should be of special interest to the practising lawyer. In this connection, the excellent analysis of accounting problems before federal regulatory bodies, particularly the Securities and Exchange Commission, given by George O. May, well-known author, lecturer and experienced practitioner in accounting, merits special mention. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.)

Program . . . . 69th Annual Meeting of the American Bar Association

The Assembly

Monday, October 28, 10:00 A. M.

(Convention Hall)

FIRST SESSION

THE PRESIDENT, presiding

Call to order

Addresses of Welcome

Walter G. Winne, President, New Jersey State Bar Association

Frank S. Farley, President, Atlantic City (New Jersey) Bar Association

Response, Robert F. Maguire, Portland, Oregon

Annual Address of the President of the Association, Willis Smith, Raleigh, North Carolina

Opportunity for offering resolutions, pursuant to Article IV, Section 2 of the Constitution

Fifth Annual Meeting of the American Bar Association Endowment

Announcement by Secretary of vacanies, if any, in the offices of State Delegate and Assembly Delegate

Nomination and election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with the adjournment of the 1948 Annual Meeting

(Meetings of members present from states in which a vacancy exists in the office of State Delegate will be held immediately following adjournment to fill such vacancies)

8:30 P. M.

SECOND SESSION

(Convention Hall)

THE PRESIDENT, presiding

Addresses: speakers to be announced

10:00 P. M.

(Marlborough-Blenheim)

Reception by the President of the Association to members and guests

Wednesday, October 30, 9:30 A. M.

THIRD SESSION

(Convention Hall)

THE PRESIDENT, presiding

Election of four Assembly Delegates for two-year term ending with adjournment of 1948 Annual Meeting

Report as to matters requiring action by the Assembly

The Chairman of the House of Delegates (or the Secretary)

Address: speaker to be announced

Open forum—Report of the Resolutions Committee

Thursday, October 31, 9:30 A. M.

FOURTH SESSION

(Convention Hall)

THE PRESIDENT, presiding

Presentation of an award of merit to a State Bar Association and a local Bar Association

Report as to matters requiring action by the Assembly The Chairman of the House of Delegates

Amendments to the Constitution and By-Laws of the Association

Statement concerning the American Law Institute By Floyd E. Thompson, Chicago, Illinois

Presentation of Winner of Ross Bequest Award

7:30 P. M.

ANNUAL DINNER

THE PRESIDENT, presiding

Presentation of American Bar Association Medal

Speakers to be announced

Introduction of the incoming President

Friday, November 1

(Immediately following adjournment of the final session of the House of Delegates)

FIFTH SESSION

THE PRESIDENT, presiding

Report of the action upon resolutions previously adopted by the Assembly, by the Chairman of the House of Delegates

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Presentation of new officers and members of the Board of Governors

Remarks by the incoming President

Adjournment

The House of Delegates

The House of Delegates will meet promptly at 2:00 P. M. Monday, October 28; 2:00 P. M. Wednesday, October 30; 2:00 P. M., Thursday, October 31, and 10:00 A. M. Friday, November 1, for the consideration of reports and recommendations of Sections and committees, and other business which may come before it.

The Calendar of the sessions of the House of Delegates will be printed in the Final Program for the Annual Meeting, and a Final Calendar containing the text of all available resolutions to come to the attention of the House, will be distributed at the first session.

Sections

Because of the shortage of paper, the JOURNAL finds it impossible to print the full programs of Sections. These appear in full in the Advance Program, being mailed to all members of the Association. The Final Program for the Annual Meeting will be distributed at Atlantic City.

The following is a resume of the sessions to be held by the Sections:

ADMINISTRATIVE LAW

Wednesday, October 30, 2:00 P. M.

Organization meeting of the Section

BAR ACTIVITIES

Sunday, October 27, 12:00 M

LUNCHEON

ANNUAL CONFERENCE OF ASSOCIATION SECRETARIES

Secretaries of State and local Bar Associations are invited to attend and take part in round-table discussions of organized bar activities, with emphasis on practical techniques and problems of bar administration.

Tuesday, October 29, 9:30 A. M.

GENERAL SESSION

Addresses and discussion on Coordinating Organized Bar Activities
Reports of Committees

2:00 P. M.

GENERAL SESSION

Addresses and discussion on Techniques of Bar Association Activities

CORPORATION, BANKING AND MERCANTILE LAW

Monday, October 28, 2:00 P. M.

Tuesday, October 29, 10:00 A. M. and 2:00 P. M.

GENERAL SESSIONS

Reports of committees and addresses on subjects of interest to members of the Section.

Tuesday, October 29, 7:30 P. M.

DINNER DANCE

CRIMINAL LAW

Monday, October 28, 2:00 P. M.

Joint meeting with Section of Judicial Administration
Addresses by Honorable Tom C. Clark, The Attorney General of the United States, and Honorable Hatton W. Sumners, Chairman, Committee on the Judiciary, House of Representatives

Tuesday, October 29, 2:00 P. M.

GENERAL SESSION

Addresses and discussion on "Criminal Law and Procedure in War Crimes Trials"
Reports of Section committees

INSURANCE LAW

Monday, October 28, 2:00 P. M.

GENERAL SESSION

Reports of Committees.
Address by General Omar N. Bradley, U.S.A., Administrator of Veterans' Affairs, Washington, D. C.

Tuesday, October 29, 9:30 A. M.

Round Tables: Automobile Insurance Law
Fire Insurance Law
Health and Accident Insurance Law
Workmen's Compensation and Employers' Liability Insurance Law
Fidelity and Surety Insurance Law
Veterans' Affairs

2:00 P. M.

Round Tables: Marine and Inland Marine Insurance Law
Aviation Insurance Law
Casualty Insurance Law
Insurance Law Practice and Procedure
Life Insurance Law
Regulation of Insurance Companies

6:30 P. M.

RECEPTION

7:30 P. M.

ANNUAL DINNER

Wednesday, October 30, 2:00 P. M.

GENERAL SESSION

Addresses and reports of committees

INTERNATIONAL AND COMPARATIVE LAW

Monday, October 28, 2:00 P. M.
Tuesday, October 29, 9:30 A. M. and 3:00 P. M.

GENERAL SESSIONS

Addresses and reports of committees

Tuesday, October 29, 12:30 P. M.

Joint luncheon of Section of International and Comparative Law and Junior Bar Conference

JUDICIAL ADMINISTRATION

Monday, October 28, 2:00 P. M.

Joint meeting with Section of Criminal Law

Tuesday, October 29, 2:00 P. M.

GENERAL SESSION

Discussion: "Should a Judge be Permitted to Comment on the Evidence in Instructing the Jury?"
Reports of committees

7:00 P. M.

DINNER

Jointly with National Conference of Judicial Councils and Junior Bar Conference

Wednesday, October 30, 2:00 P. M.

Joint meeting with Committee on Improving the Administration of Justice and National Conference of Judicial Councils

JUNIOR BAR CONFERENCE

Sunday, October 27, 9:30 A. M.

BREAKFAST

Annual Meeting with the Junior Bar Conference of Delegates from Junior Bar groups affiliated with the Junior Bar Conference

12:30 P. M.

LUNCHEON

2:00 P. M.

GENERAL SESSION

Round Table Forum: "How Can the Junior Bar Conference Increase Its Usefulness?"
Reports of committees

Monday, October 28, 10:00 A. M. and 2:00 P. M.

Meetings of committees of the Conference
Open Hearings by Resolutions Committee

Tuesday, October 29, 10:00 A. M.

GENERAL SESSION

Announcements of awards to affiliated Junior Bar groups
Addresses and reports of committees

12:30 P. M.

Joint luncheon with Section of International and Comparative Law

7:00 P. M.

The members of the Junior Bar Conference have been invited to attend the dinner of the Section of Judicial Administration

10:00 P. M.

DANCE

LABOR RELATIONS LAW

Tuesday, October 29, 10:00 A. M. and 2:00 P. M.

Organization meeting of the Section

LEGAL EDUCATION AND ADMISSIONS TO THE BAR
Jointly with
NATIONAL CONFERENCE OF BAR EXAMINERS

Tuesday, October 29, 9:00 A. M.

Annual Meeting of National Conference of Bar Examiners

12:30 P. M.

Joint luncheon of the Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners

2:00 P. M.

Annual Meeting of the Section of Legal Education and Admissions to the Bar

MINERAL LAW

Tuesday, October 29, 10:00 A. M. and 2:00 P. M.

GENERAL SESSIONS

Addresses and reports of committees

12:30 P. M.

LUNCHEON

MUNICIPAL LAW

Monday, October 28, 2:00 P. M.
Tuesday, October 29, 10:00 A. M. and 2:00 P. M.

GENERAL SESSIONS

Addresses and reports of committees

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

Friday, October 25, 10:00 A. M. and 2:00 P. M.

GENERAL SESSIONS

Reports of Committees

12:30 P. M.

Luncheon, under auspices of International Association for Protection of Industrial Property

Saturday, October 26, 10:00 A. M. and 2:00 P. M.

GENERAL SESSIONS

Reports of Committees

7:30 P. M.

DINNER

SECTION OF PUBLIC UTILITY LAW
Monday, October 28, 2:00 P. M.
Tuesday, October 29, 10:00 A. M. and 2:00 P. M.
GENERAL SESSIONS

Reports of Committees

Tuesday, October 29, 7:30 P. M.
DINNER DANCE

REAL PROPERTY, PROBATE AND TRUST LAW
Monday, October 28, 2:00 P. M.
GENERAL SESSION

Reports of officers
Program of Real Property Division
Addresses and discussion
Reports of committees

Tuesday, October 29, 10:00 A. M.
GENERAL SESSION

Program of Trust Division
Reports of committees
Address

2:00 P. M.
GENERAL SESSION

Program of Probate Division
Addresses and reports of committees

7:30 P. M.
DINNER

TAXATION
Sunday, October 27, 10:00 A. M. and 2:00 P. M.
GENERAL SESSIONS

Reports of Committees

12:30 P. M.
LUNCHEON
Monday, October 28, 2:00 P. M.
Tuesday, October 29, 2:00 P. M.
GENERAL SESSION
Reports of committees

Additional Proposed Amendments

to the Constitution and By-Laws of the American Bar Association

To be presented and acted upon at its Sixty-Ninth Annual Meeting at Atlantic City, New Jersey, October 28 - November 1, 1946

V.

Notice is hereby given that WALTER M. BASTIAN, of Washington, D. C., RONALD J. FOULIS, of St. Louis, Missouri, TAPPAN GREGORY, of Chicago, Illinois, W. J. JAMESON, of Billings, Montana, CARL MCFARLAND of Washington, D. C., JAMES R. MORFORD, of Wilmington, Delaware, and WILLIS SMITH of Raleigh, North Carolina, members of the Association, have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(1) Amend Article II, Section 1 of the By-Laws by striking the entire section and substituting therefor the following:

ARTICLE II

"Section 1. Scale of Dues. Each member shall pay Association dues for each year from July first to June thirtieth following, payable on July first of each year in advance, in such amount as may be from time to time determined by the House of Delegates upon the recommendation of the Board of Governors, which amount shall include the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, which is $1.50 per year; except that during the first five years after his original admission to the Bar, the Association dues of a member shall be in an amount not in excess of one-half of the amount determined for regular members as above provided."

(a) Amend the first sentence of Article I, section 3 of the By-Laws by striking from lines 4 and 5 thereof the words "the sum of $150 for such life membership," and substituting therefor the words, "such sum for life membership as may be fixed from time to time by the House of Delegates upon the recommendation of the Board of Governors," so that said sentence of Article I, section 3 will read as follows:

"Section 3. Life Membership. Any member of the Association who shall have paid regular dues for a period of ten years, may become a life member of the Association upon written notice to the Treasurer and payment of such sum for life membership as may be fixed from time to time by the House of Delegates upon the recommendation of the Board of Governors".

JOSEPH D. STECHER, *Secretary*

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Criminal Law — Mental Deficiency Short of Insanity as a Factor in Determining First Degree Murder

Fisher v. *United States*, 90 L. ed. Adv. Ops. 1078; 66 Sup. Ct. Rep. 1318; 14 U. S. Law Week 4467. (No. 122, argued December 5, 1945, decided June 10, 1946).

Fisher, the petitioner, admittedly killed a woman in the District of Columbia. He was then employed as a janitor at the Episcopal Cathedral in Washington, and the victim, Miss Reardon, was there employed as librarian. His story to the jury was that his victim had complained to the verger about the convict's work, and the latter had been informed of the complaint a few days before the killing. Fisher and Miss Reardon were in the library on the fatal day and he testified that he killed her immediately following insulting words from her over his care of the premises. After slapping her impulsively Fisher ran up a flight of steps to reach an exit, but, seizing a stick of firewood, ran back to stop Miss Reardon's screaming. He struck her with the stick, choked her to silence, dragged the body to the lavatory, and returned to clean up blood spots on the floor. Miss Reardon screamed again and Fisher stuck her in the throat with a pocket-knife. The body was found in a pump pit next morning.

But the opinion of the Court points out that other facts might have led the jury to disbelieve some of the details of Fisher's testimony. His original confession made no reference to the use of insulting words. In his written confession they were mentioned, and their effect was amplified at the trial. The written confession admitted that the main reason for the assault on the librarian was because she reported Fisher for not cleaning the library floor.

Under instructions by the trial court in usual form as to insanity, irresistible impulse, malice, deliberation and premeditation Fisher was convicted of murder in the first degree, a crime of which deliberate and premeditated malice are elements.

The defense sought to show second degree murder, because it was not deliberate and premeditated. The trial court was asked by defense counsel to instruct the jury that it might weigh the evidence of Fisher's mental deficiencies, which were short of insanity in the legal sense, in determining the accused's capacity for premeditation and deliberation. This was refused; conviction followed and was affirmed by the District Court of Appeals.

On certiorari the judgment was affirmed by the Supreme Court. Mr. Justice REED delivered the opinion of the Court. Resting the decision on the law as established in the District of Columbia, the Court says: "it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of insanity, which would reduce his crime from first to second degree murder."

Mr. Justice FRANKFURTER, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE each delivered dissenting opinions, and each of them expressed their concurrence with substantial portions of the other dissents.

Mr. Justice FRANKFURTER emphasized his view that the accused was a man of such a degree of "mental deficiency", and of such susceptibility to anger that premeditated intent was not shown. Specifically he attributed the crime to the desire to silence the cries of his victim and not to a desire to kill her.

Mr. Justice MURPHY's dissent laid weight on the action of Congress in amending the District of Columbia Code by creating two degrees of murder, and contends that the offense of second degree murder should not be restricted to murder while under the influence of intoxicating liquors but that murder from sudden rage or fear should also compel the murder to be classed as second degree, since deliberate intent was quite as much lacking in the latter category as in the first. He fortifies his contention by saying: "Only by integrating scientific advancement with our ideals of justice can law remain a part of the living fibre of our civilization."

Mr. Justice RUTLEDGE adopts the more important grounds of dissent from the opinions of Mr. Justice FRANKFURTER and Mr. Justice MURPHY.

The case was argued by Mr. Charles H. Houston for Fisher and by Mr. Charles B. Murray for the United States.

* Assisted by JAMES L. HOMIRE.

Criminal Law—Violation of Section 35 (A) of Criminal Code—Evidence for Conviction—Illegal Search and Seizure

Zap v. *U. S.*, 90 L. ed. Adv. Ops. 1128; 66 Sup. Ct. Rep. 1277; 14 U. S. Law Week 4447. (No. 489, argued February 5 and 6, decided June 10, 1946).

Zap made a contract with the Navy Department to do experimental work on airplane wings and to conduct test flights, on a cost plus fixed fee basis. He induced a pilot to endorse a blank check, paid him $2500, filled in the check for $4000 and used it in support of a claim that he paid the pilot the larger sum. The contract contained a consent to examination by Government agents of the contractor's books and records. Agents of the F.B.I., investigating the books, found the check and took possession of it. At the trial it was offered in evidence and admitted over a motion to suppress. The trial judge also overruled a motion to strike the evidence because illegally obtained.

The narrow question for decision was whether the check itself could be introduced at the trial. In view of the contractual consent to the investigation of records and accounts, the Supreme Court, in an opinion by Mr. Justice DOUGLAS, concludes that the introduction of the check itself was not a violation of the Fourth or Fifth Amendments.

Mr. Justice FRANKFURTER delivered a dissenting opinion urging a reversal of the judgment, because the seizure of the check was, in his view, illegal under the Fourth Amendment. He emphasized that that Amendment condemns both illegal searches and seizures, and that the legality of the search, because consented to, does not validate the seizure which was made without a valid warrant.

Mr. Justice MURPHY and Mr. Justice RUTLEDGE concurred in the dissent.

The case was argued by Mr. Morris Lavine for Zap, and by Mr. Ralph F. Fuchs for the Government.

Criminal Law—Conspiracy to Violate Rationing Law and Regulations—Instructions as to Burden of Proof—Harmless Error

Bihn v. *United States*, 90 L. ed. Adv. Ops. 1208; 66 Sup. Ct. Rep. 1172; 14 U. S. Law Week 4449. (No. 675, argued March 26, decided June 10, 1946).

The petitioner and one Bennett were convicted of a conspiracy to violate the law and regulations governing the rationing of gasoline. Petitioner was employed in a bank, where she handled gasoline rationing coupons. These she kept in a steel file which she kept locked; but the keys to it were kept in her desk which was not locked. Also, at least four others had access to the steel file containing the coupons. The petitioner was charged with stealing the coupons and transferring them to Bennett who shared with her the profits of an illegal traffic.

The question for decision was whether the jury was properly instructed as to the burden of proof, in view of the fact that four other persons were in position to have stolen the coupons, though on the evidence the petitioner's guilt could have been inferred also. In instructing the jury, the trial judge said, among other things: "Did she steal them? Who did if she didn't? You are to decide that." This, being duly objected to, is held to be reversible error, because it could be construed as putting on the petitioner the burden of proving who stole the coupons, if she did not. The Supreme Court, in an opinion by Mr. Justice DOUGLAS, concludes that this was prejudicial error, not cured or rendered harmless by general instructions which correctly stated the law as to burden of proof.

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice REED and Mr. Justice BURTON joined. This opinion urges that the law on burden of proof was correctly stated seven times in the course of the charge, and the instruction objected to is not shown to have confused the jury.

The case was argued by Mr. Henry K. Chapman for Bihn, and by Mr. John J. Cooney for the Government.

Criminal Law—Violation of Rationing Laws—Search and Seizure of Gasoline Rationing Coupons—Validity Under Fourth and Fifth Amendments

Davis v. *United States*, 90 L. ed. Adv. Ops. 1156; 66 Sup. Ct. Rep. 1256; 14 U. S. Law Week 4438. (No. 404, argued February 5, decided June 10, 1946).

The petitioner was convicted of unlawful possession of gasoline rationing coupons. He was president of a corporation which maintained a gasoline filling station in New York City, suspected of black market operations. Agents watched the place, and later purchased gasoline from an attendant without coupons. But to get it without coupons they had to pay more than the ceiling price. They then arrested the attendant, and while she was undergoing questioning the petitioner came to the station. He was arrested and his car searched. Both attendant and petitioner were charged with selling gasoline without coupons and above the ceiling price. Examination of the tanks and the coupon boxes revealed discrepancies between the gasoline sold and the coupons. Petitioner was taken into the nearby office of the station and in the course of questioning was persuaded or coerced into opening a filing cabinet in which were the coupons on which the conviction rests. These he handed over to the agents. He was later brought to trial and convicted, though duly objecting to the introduction of the coupons in evidence on the ground that they were seized in violation of constitutional rights. No warrant had been issued for either the search or the seizure.

The District Court ruled that the surrender of the coupons by petitioner was voluntary. Expressing skepticism of the correctness of this ruling, but not setting it aside, the

Circuit Court of Appeals affirmed on the ground that the search and seizure were reasonable as incidents to arrests for crimes committed in the presence of the officers who made the search and seizure.

The Supreme Court, on certiorari, affirmed on the ground that it was unable to say as a matter of law that the District Court's ruling was erroneous. Mr. Justice DOUGLAS delivered the opinion of the Court. He stresses the fact that the coupons are the property, not of the petitioner, but of the Government, and are, therefore, public rather than private property. Possession of coupons in contravention of the regulations is unlawful, and the custodian is under duty to surrender them on demand.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice MURPHY concurred. This opinion exhaustively analyzes the history and interpretations of the Fourth Amendment.

Mr. Justice RUTLEDGE agreed substantially with the views of Mr. Justice FRANKFURTER, and added, in a brief dissenting opinion, that there was no such consent as would legalize the entry and search, nor was the search justified by the doctrine of reasonable search as incident to a lawful arrest.

The case was argued by Mr. Samuel Mezansky for Davis and by Mr. John J. Cooney for the Government.

Criminal Law—Conspiracy to Violate Revenue Laws—Responsibility of One Conspirator for Substantive Crimes of Co-conspirator in Carrying out the Conspiracy

Pinkerton, et al. v. *United States,* 90 L. ed. Adv. Ops. 1212; 66 Sup. Ct. Rep. 1180; 14 U. S. Law Week 4456. (No. 719, argued May 1, decided June 10, 1946).

Two brothers, Walter and Daniel Pinkerton, petitioners, were convicted and sentenced on substantive counts for violations of the Revenue Code, and also on a conspiracy count. The alleged conspiracy was for the purpose of committing the substantive crimes. There was but a single conspiracy charged and proved, but each of the substantive counts was found to have been committed pursuant to the conspiracy. Sentences were imposed, after a verdict of guilty of conspiracy and on some of the substantive counts, for a term longer than the maximum 2-year sentence which may be imposed for conspiracy.

The petitioners contended that the substantive counts, having been committed pursuant to the conspiracy, became merged in it, and that only a single sentence may be imposed. This argument the Supreme Court rejects, in an opinion by Mr. Justice DOUGLAS. Distinguishing *Braverman* v. *U. S.,* 317 U. S. 49, relied on by the petitioners, he reviews the prior decisions on the subject and concludes that, "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

Mr. Justice RUTLEDGE delivered a dissent as to the judgment concerning Daniel Pinkerton, and as to the conviction of Walter Pinkerton on the conspiracy charge. Mr. Justice FRANKFURTER agreed with the dissent, reserving judgment, however, on the question of double jeopardy which Mr. Justice RUTLEDGE discusses in dealing with Daniel Pinkerton's case.

The case was argued by Mr. John S. Tucker, Jr. for Pinkerton and by Mr. W. Marvin Smith for the Government.

Criminal Law — Conspiracies Under General Conspiracy Section of Criminal Code—Application of "Harmless Error Statute"

Kotteakos et al. v. *United States,* 90 L. ed. Adv. Ops. 1178; 66 Sup. Ct. Rep. 1239; 14 U. S. Law Week 4427. (Nos. 457 and 458, argued February 28, decided June 10, 1946).

Thirty-two defendants were indicted for conspiracy to induce financial institutions to grant credit, with the intent that the loans would be offered to the Federal Housing Administration for insurance upon fraudulent applications. Nineteen of the defendants were tried, two acquitted, seven convicted, and as to four the jury disagreed. The conspiracy had a common key figure in all the transactions proved. This was one Brown, who pleaded guilty. He acted as a broker in obtaining loans, through fraud, from the Housing Administration for the other parties charged; but there was no showing that the various transactions were connected or, in most cases, that the defendants had any relationship with one another, except for Brown's connection with each transaction. The trial judge erroneously instructed the jury that upon the evidence there could be a single conspiracy. Upon appeal the Circuit Court of Appeals, though recognizing this instruction to be plainly erroneous, nevertheless sustained the conviction on the ground that the error, in the circumstances, was harmless.

On certiorari the Supreme Court reversed the judgment. Mr. Justice RUTLEDGE delivered the opinion of the Court. His opinion develops the background of the so-called harmless error statute, and finds that it does not apply to this case. He also analyzes and distinguishes *Berger* v. *United States,* 295 U. S. 78, relied on by the Circuit Court of Appeals and in the dissenting opinion of Mr. Justice DOUGLAS. "The sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation."

Mr. Justice BLACK concurred in the result.

Mr. Justice DOUGLAS and Mr. Justice REED agreed in a dissent which holds that the error in the instruction to the jury was harmless error.

The case was argued by Mr. Henry G. Singer for Kotteakos, et al. and by Mr. W. Marvin Smith for United States.

REPLY TO MR. BRIGGS

(Continued from page 638)

consistent with natural law and the progress of the world. But that does not mean that he should abdicate his reason, stultify his conscience, abase himself before the state merely because it is dominated by a majority rather than by a Nero, an Ivan the Terrible, a Caligula or a Hitler, that he have no standard for criticism of the positive law or that he accept Austin's quoted statement that "law is itself the standard of justice." Nor because he says that the minority have rights under principles of natural law does he say that the minority should rule.

That is not the alternative. At the risk of being branded an enemy of the people, we can take our stand with saints and sages from Herodotus to Jefferson, Washington, Adams, Mason, Marshall, Wilson, Jay and Hamilton who knew that a dictatorship of the many is as hateful and in the long run as provocative of disorder as the tyranny of the one.

Absolutism of the Majority Is Still Unacceptable

Is there any difference to me or to the minority between the absolutism of King James I and King Demos? Is the destruction of my unalienable rights less to me because I bend under the lash of a dictatorship of the proletariat rather than a Czarist knout? Jefferson said, "an elective despotism was not the government we fought for." And in Leslie's *Cassandra,* written during the controversy over the divine right of kings, Hottentot says to another, who had boasted of English freedom: "So you are free because you are hanged by a jury. But what think you of an Act of Attainder which can hang without any trial or giving you reason for it?"

Hoad: "This is part of our constitution, that the Parliament should have such a power in extraordinary cases."

Hottentot: "Yet you are free!"

Hoad: "Well, but the *King* cannot hang us at his pleasure."

Hottentot: "That is, you are not at the mercy of one man, but of five hundred. *O delicate freedom!*"

And may we not quote hastily from memory Lord Acton's saying: "The possession of unlimited power which corrodes the conscience, hardens the heart and darkens the understanding of monarchs exercised its demoralizing influence upon the illustrious democracy of Athens." Or the words of St.Augustine of Hippo, standing amidst a great city where now the desert jackals roam and speaking while Alaric the Goth was hammering at the gates of the Eternal City: "What are kingdoms without justice but organized brigandage?"

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Philip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Withholding of Tax — Wages v. Damages

The Bureau has recently ruled upon the withholding status of several types of payment made by employers under statutory compulsion:

(1) NLRB back pay award. In 1943 the Bureau ruled that back pay did not constitute "wages" subject to victory tax withholding, and this position was maintained under the present withholding statute. Early this year, however, the Supreme Court held in *Social Security Board v. Nierotko,* 66 Sup. Ct. 637, that such payments were "wages" under the Social Security Act. In conformity with the rationale of this opinion, the Bureau has now reversed its position as to income tax withholding. Nevertheless, it will not hold an employer liable for the tax if he made full payment to the employee prior to the date of the new ruling. Mim. 6060 (August 28, 1946).

(2) Fair Labor Standards Act. Withholding is required with respect to retroactive wages and overtime compensation paid under the Fair Labor Standards Act, but not with respect to liquidated damages under section 16 (b) of the Act. The latter payments are nevertheless taxable income to the employee. I.T. 3742, C.B. 1945, 320; see Mim. 6028, I.R.B. 1946-14-12345.

(3) Veteran's reinstatement. Amounts recovered by a veteran under section 8 (e) of the Selective Training and Service Act, because of the employer's failure to reinstate him, are subject to withholding. I.T. 3809, I.R.B. 1946-15-12356.

Long-term Compensation

Many attorneys are personally concerned with the relief provision of I.R.C. §107, which permits compensation received in one year to be spread back over the years during which it was earned, provided that 80% of the total compensation was received in one year. A recent Tax Court case involving a physician announces a limitation which may equally affect an attorney.

In that case, the taxpayer had rendered continuous services to a patient for many years on a running account. In 1939 and 1940 he received payments which were specified to be for services rendered from 1934 to 1939. In 1943 he received a further fee for services rendered between 1939 and 1943. This latter fee he sought to allocate to the years 1939-1943. The court refused to permit any allocation for the reason that the 1939 and 1940 payments were more than 20% of the total fee. Where continuous services are rendered on running account, the entire period of the services may not be broken up by attributing the first payments to a part of the period. *Julia C. Nast,* 7 T.C. No. 55.

Partnership Income Paid To Decedent's Estate

Another tax problem in which many law firms have a personal interest arises upon the death of a partner, where the partnership agreement provides that the decedent's estate shall receive a share of post-death partnership income for a specified period. A few months ago, the Tax Court held that an agreement by a personal service partnership to share post-death income with the estate normally results in a division of the partnership income among the survivors and the estate. The transaction is not to be construed as a "purchase" by the survivors of the decedent's interest in the partnership. *Charles F. Coates,* 7 T.C. No. 17.

The result is different, however, where the estate is immediately paid a single sum as an estimate of the decedent's share of earned but uncollected income. In that case, the payment is in effect an investment by the survivors in accounts receivable, and is deductible proportionately over the period during which the accounts are collected. If there is no evidence as to the time of these collections, no deduction to the survivors is allowable, and they are taxable upon the entire partnership income. *Raymond S. Wilkins,* 7 T.C. No. 63.

War Losses

Section 127 does not provide the sole means for deducting a loss caused by the war. In *Eugene Houdry,* 7 T.C. No. 80, the taxpayer was a French citizen residing in the United States. In May, 1941, his citizenship was abrogated by the Vichy government, and his real property located in France was confiscated. The taxpayer claimed a loss in 1941. The government refused to recognize the loss on the authority of the regulations which state that the "war loss" statute does not apply unless the taxpayer owned the property at the time of declaration of war. The Tax Court, however, pointed out that the loss actually occurred before the declaration of war, under general principles of the tax law, and that the taxpayer did not have to rely upon the special relief provisions of section 127. The 1941 deduction was therefore allowed.

Federal and State "Taking" of Private Property

Proponents of the revised condemnation rule suggest that there should be borne in mind what they regard as an important distinction between the exercise of the sovereign right of eminent domain by the United States government and by the several States. They suggest that lawyers whose practice has been confined to State condemnations may overlook the consequences of the Acts of Congress which give to the federal government the power to take immediate possession of private property sought to be devoted to a public use, before the value of the property and the just compensation for its taking have been ascertained.

That power has not been given to, or even sought to be exercised by or on behalf of, any of the States. In federal practice, the government itself estimates, in advance of the taking, what it considers to be just compensation, and deposits the estimated compensation money in the registry of the District Court at the time of filing its complaint. Whereupon immediate possession is almost a matter of course. Thus the property owner stands without his property or his compensation until the end of the litigation.

Sponsors of the draft do not call attention to this difference in any criticism of the action of the Congress in giving this power to the federal government. In time of war that power is regarded by most as indispensable; and even in times of peace, the necessity to take land for the control of flood waters and other occurrences of critical urgency could not, it is believed, be left to depend on the slow course of State procedures.

In consequence of this difference, the matter of greatest concern to the property owner and to the administration of justice in federal condemnation cases is believed by the proponents of the rule to be speed in the ascertainment and the payment of the compensation. In this respect the procedure in the federal courts is regarded as being different from that in the State courts that lawyers have criticized the proposed rule as "making things too easy for the government", whereas in fact the prime object of the procedural rule is not to make it easy for the government. Congress has done that by its "immediate taking" Act. The prime object of a rule is regarded as being to facilitate and expedite the ascertainment of just compensation and its prompt payment to the property owner for his property.

Speak Your Views as to Changes

Our leading editorial discusses changes in the Rules of Civil Procedure, recommended by the Supreme Court's Advisory Committee. That as to "discovery" access to adversary files is disturbing many lawyers. We give also the text of a sub-committee's draft of a condemnation rule. An "open forum" at Atlantic City will give lawyers a chance to make known their views as to these controversial changes.

"WORLD GOVERNMENT"

(Continued from page 645)

formation of the whole world into such an entity, completely sets at naught the stubborn facts of history and geography. Take the South American countries alone; consider their differences of race, their rivalries and political, historical and geographical backgrounds. Could they all be united into one state? Take Europe; what would be the problems and difficulties of organizing a United States of Europe? Take the Near East; take Asia Minor; take the Far East with India and China. Could any of these areas be united into a single political entity of free and representative government? Can we have confidence that all the realities, social, historical, religious and geographical, could be bridged by an unreal analogy, and the whole world organized as a political unit, because 157 years ago thirteen small and contiguous colonies along the Atlantic seaboard, with a common language and a common legal and political background, were so formed into a constitutional republic?

But the argument will be turned around when the fallacy of the analogy is exposed, and it will be said: "Very well, so much more the reason. If we are to have peace, all of these diverse nationalistic entities must federate; they must be organized into a world government; otherwise there will be no peace." But how? Are the great Powers, or some of them to force all Nations, large and small, to accept a "world government"? What happens when states or even large groups of persons are unwillingly forced into a political union or are forced unwillingly to remain a part of such a union? War, of course. We call it civil war but there is nothing in the history books that tells us that civil war is any less bloody and destructive than other kinds of war. It merely goes by a different name.

But suppose by some conceivable stroke of good fortune and as a result of a period of world unanimity, and by much promising and loaning of money on our part, we did get everybody in the world except Russia and its satellites to federate. Certainly nobody could so far overlook the realities as to suppose that Russia would now or in the foreseeable future federate with England and the United States. But a world state that left out the Russian *bloc* would of course mean at least two worlds.

Why is Russia not likely to federate? Is it because of its economic system? Perhaps this might somehow be adjusted if all other states agreed to adopt a similar planned economy. No, it is the Russian state of mind.

The fact is that it is a totalitarian police state with none of the liberties of the Anglo-Saxon, with an "iron curtain" which not only cuts off the rest of the world but keeps the Russians from knowing what is happening in the rest of the world. As a police state, all of its resources can be mobilized and directed toward whatever end may be determined by the coterie of resolute men who from time to time control Russia. Its resources could as well be mobilized for civil war as for any other kind of war.

Russian "Boring from Within"

Many other considerations are involved. Russia entertains a point of view regarding religion which could not be federated with other religious points of view. The religious and political dynamics in Russia are directed to undermining and taking over every opposite point of view.

The Communists, with the zeal of true believers, would in a world federation go on working to insure the triumph and universal imposition of their faith and their economic, social and political tyranny. This insistence on submission and subservience to their ideology has taken place again and again in American Labor unions. It is called "boring from within". It could and would happen in a world union.

World Government Now a Wrong Choice

As Elmer Davis has said:

> No world state like that, thank you; the alternative may be perilous, but at least, choosing the alternative, we know enough to be on our guard. A year or so ago, most of us supposed that Russian objectives, in the main, were the same as ours: and extensive concessions were made to them on that hypothesis. It now seems to have been mistaken; we do not want another disillusionment, on a grander scale, which might come too late. Possibly the Russians want the same things we want, but let us wait for a little more evidence. Time is short, say the atomic scientists, and survival is at stake. Well, survival is at stake both ways; another war would be a catastrophe for all concerned—especially for the losers. But the wrong kind of world state would be a catastrophe for the winners, as well as the losers.

The thinking of the "world government now" advocates is simple and direct, as is all thinking based upon slogan or analogy. Dispense with National independence, National boundaries, National characteristics, National freedom of choice and National interests, by establishing a "world government" or superstate. There will then be no independent nations to war with one another. The logic of the proposal is unanswerable—quite as simple and unanswerable as: Organize a sinless world, and sin will no longer be a problem. All will grant that the success of the proposal would be assured, once National boundaries, characteristics, independence, freedoms and ambitions were eliminated from the world.

Are We Ready to Sacrifice American Standards?

But, say its supporters: Why not make the effort? If it fails, can we be any worse off than we are now? Is that true? To have a "world government", we would have to have one world. Hence somehow, by pursuasion or force, we would have to bring Russia and all other nations in. To do this by force would require war. To do it by persuasion we would obviously have to do many things—for example, we would have to give to other countries and the peoples thereof the power and right to govern the world, and us by majority rule. If there is to be manhood suffrage for us, then there would have to be also for Russia, China, India, Indonesia and the rest. If there is to be employment at adequate wages and under high working conditions for us, the same standards must be declared and enforced for other peoples everywhere. If there are to be adequate housing and living conditions including both food and clothing for us, so everywhere for others. Or our own standards and ways of life would have to be subordinated and surrendered to the majority. Because the United States would be in a position of hopeless minority, our way of life, our civilization, our standards, would be put in jeopardy, to be leveled out to an equality with the way of life of all other peoples.

Americans Do Not Want to Be Ruled by Other Nations

But it is asked: Would not that be better than risking another war? The answer is: No; not for Americans. Once in—as free men we would even risk a civil war to get out of such an arrangement. War is terrible, and usually leaves as many problems as it solves or more. But to live in a world dominated politically, and hence under modern government technique dominated socially, economically and culturally, by the masses of India, China and Indonesia, or by such a combination as

Russia might control—for men with an Anglo-Saxon and a Christian background this would be an intolerable world. Let those who think it would be tolerable spend at least a year in any one of these areas. Not a day here and a day there like Wendell Willkie, feted by a few of the official class. Let them spend at least a year there, and they will return with the conviction that while war is terrible, free men should not be terrified into setting up a world super-state—in which not only their lives and their fortunes and their liberties would be dominated by the votes of alien majorities, but their very language, their Christian religion and their culture would be that of a minority people.

Realities Should Be Faced

If you want to know the terror and handicap always suffered by a minority people, read the history of the struggles of minorities everywhere and their efforts to preserve the identity of their language, their religion and their culture—read of the Dutch under the Spanish, the Poles under Russia, and even of the Irish under the enlightened British. Do Americans want majority rule by the rest of the world, over their lives, their freedoms, their religious faiths, their institutions of free government?

These are some of the realities which must be faced in considering the persistent agitation. Because of these realities recognized by thoughtful and experienced men in all countries as well as in our own—for Russia no more wishes to be a part of a "one world" government in which she would be in the minority than we do—the world sought to hold fast to the charted course of establishing and maintaining peace and justice through an international Security organization like The United Nations.[2]

The Choice Made at San Francisco

The enthusiasm with which the advocates of "world government now" advance their cause would indicate they think they were the discoverers of the idea of a world super-state to end war and that the representatives of the Nations at San Francisco overlooked this simple and direct formula for peace. This is somewhat naive. The representatives of The United Nations at San Francisco did not overlook the "world government" idea because they were ignorant of it but, being men of background and experience, they were realists to the extent that they could not overlook the difficulty and impossibility of welding the present world into one super-state. Therefore they sought to set up and did set up an organized international cooperation through security organization to prevent aggressive war and increase the scope and authority of law between Nations.[3] After all, a war of aggression is the kind of war we are con-

2. Foreign Minister Evatt, of Australia, fighting spokesman of the smaller Nations, declared in New York on November 27, 1945: "The plain fact is that the Nations and peoples of the world are not yet prepared to surrender the rights of self-government in order to be governed by a central Executive and a central Legislature on which most of them would have a tiny and very insignificant representation".

3. Advocates of surrendering now American freedom of decision and action in international affairs will do well to read and ponder the debate and vote in the Senate as recently as August 3, in adopting the Connally amendment of the Morse Resolution as to the World Court, which was reported fully in the September issue of the JOURNAL (pages 542, 543). The decisive majority in the Senate held to the view that even in agreeing in advance to accept the jurisdiction of the Court in the enumerated classes of cases (Article 36 of the Statute of the Court), the United States did not agree to submit matters "essentially within the domestic jurisdiction" of this country and reserved to itself the right to decide what disputes involve such "domestic" matters.

cerned about, and the prevention of war and the establishment of law in the world are our principal objectives.

Peace Is Menaced by Talk of a Super-state

Before The United Nations was given a fair chance to function and succeed, the advocates of "world government now" launched their program and their propaganda for giving up The United Nations and fashioning a world super-state. This has served already to undermine the faith of many citizens of this country in The United Nations. Its further injection into the international situation at this time would be regarded by other Nations, particularly Russia, as a defeatist and disruptive action on the part of the United States, and it might well actually increase rather than lessen the tensions which could lead to another war.

Russia and its satellites are at least in The United Nations Organization now and are taking part in its work and plans. The Soviet Union is a difficult member, as Americans see it, and may continue to be such for some time; but it is doubtful if Russia intends to wreck or withdraw from The United Nations. Americans should give to Russia no valid excuse for withdrawing, as might be done by sponsoring at this time a world state based on majority rule. The Soviet Union has repeatedly shown its fear of majority decisions against it, and its insistence on freedom of decision and action for itself.

If we are sincerely interested in peace and law, we all should unitedly support The United Nations as the American Bar Association has repeatedly urged, implement the present Organization and strengthen it as fast as Russia and the other Nations will go along with us; but we should not disrupt and dissipate the influence and effectiveness of what we now have by advocating its abandonment in favor of an entirely different concept which would be designed to bring about and ensure a lot of other things besides peace.

THE CONNALLY AMENDMENT

(Continued from page 662)

"Will you agree that certain of our legal disputes should be brought before a Court?"

"That does not suit me. My vital interests might be compromised. . . "

"Am I to think, then, that you consider that your interests should be placed above even the rights of another?"

"Oh, not at all! That would be contrary to moral right. Only my interests must be protected by my rights, and I am afraid that the Court might make a mistake.

"We agree that the Court might misunderstand your case. It is composed of men, and men are liable to err. But do you not think that moral or intellectual errors in a judgment will be more frequent and more numerous if you judge your case yourself? Do you not see the injustice that will occur when your adversary is weaker than you, and at the same time has also vital interests at stake, and right also on his side?"

At that the large State turned its back, so to speak, on the little State, and as mutual consent was necessary, things remained as they were.

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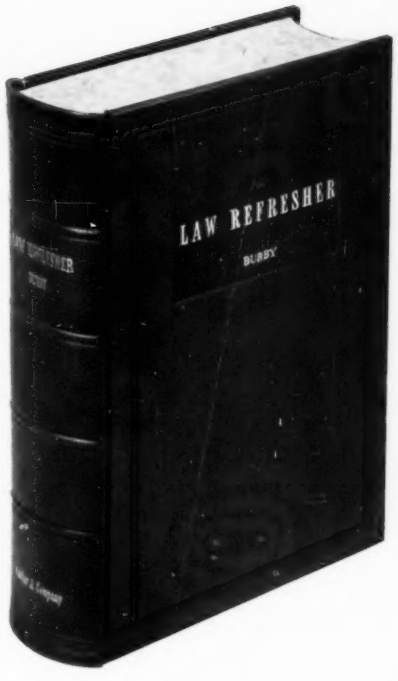

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